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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 792

UNION PRODUCING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Union Producing Company respectfully prays the issuance of a writ of certiorari to review an order of the United States Court of Appeals for the District of Columbia entered January 30 1956 which reversed orders (R. 26, 46)[1] of the District Court for the District of Columbia filed December 1 and December 31 1954 granting petitioner (plaintiff below) an interlocutory injunction and sustaining the complaint. The decision of the Court of Appeals, one judge dissenting, directs vacating of the preliminary injunction and dismissal of the complaint.

[1]The designation R. refers to the record filed with the Clerk of this Court. The designation App. refers to the appendix to this petition, separately printed and submitted as part hereof.

Opinions Below

The opinion of the Court of Appeals filed January 30 1956 (R. 57, App. 21), is not yet reported. The opinion of the District Court sustaining the complaint is reported in 127 F. Supp. 88. The opinion of the District Court in granting the preliminary injunction (App. 30) is not reported. Petition for rehearing was denied by the Court of Appeals without opinion, one judge dissenting (R. 76).

Jurisdiction

The order of the Court of Appeals was entered January 30 1956 (R. 64), and its order denying rehearing February 28 1956 (R. 76). The jurisdiction of this Court is invoked under 28 USC § 1254 subd. 1, 62 Stat. 928.

Questions Presented

1. Is petitioner, which claims to be outside the jurisdiction of the Federal Power Commission under the Natural Gas Act, barred by the doctrine of exhaustion of administrative remedies from invoking judicial intervention against orders of the Commission (viz. Nos. 174 and 174-A) alleged in petitioner's complaint to prejudice its property rights and to exceed the Commission's statutory powers?

2. Does such doctrine, if assumed to be applicable in such a case, go so far as to oblige a natural gas producer (claiming statutory immunity from the jurisdiction of the Federal Power Commission) to initiate an original administrative proceeding for declaration of its status after failure to obtain administrative action on a 'rehearing' application

(subsequently denied) of the offending administrative order in sufficient time to meet an imminent filing date which, if met, destroys its legal right and freedom to contest jurisdiction and, if not met, interrupts and destroys its business and subjects it to onerous penalties?

3. Does a complaint alleging the illegality of administrative action, irreparable damage therefrom and coercive penalties for non-compliance, state a good cause for injunctive relief?

4. Do Federal Power Commission Orders 174 and 174-A (substantially similar to the amending Order 174-B) comply with due process and statutory standards in (a) reducing producers' natural gas rates retroactively without notice or hearing and (b) invading the State jurisdiction over the production of natural gas?

Statutes and Orders Involved

The relevant provisions of the Natural Gas Act of 1938, 52 Stat. 821 as amended by 56 Stat. 83, 15 USC §§ 717 ff., appear in Sections 1, 2, 4, 7, 16, 21 and 22 (App. 127).

Order 174, 19 Fed. Reg. 4534, was issued by the Federal Power Commission July 16 1954 (App. 33); Order 174-A, 19 Fed. Reg. 5081, was issued August 6 1954 (App. 60); and Order 174-B was issued December 17 1954, 19 Fed. Reg. 8807 (App. 86).

The relevant provisions of the Administrative Procedure Act, 60 Stat. 327, 5 USC §§ 1001 ff., appear in Sections 4 and 10 (App. 123).

Statement of the Case

Petitioner is a Delaware corporation engaged in producing oil and natural gas in Texas, Louisiana and Mississippi. Its rates have never been filed under the Natural Gas Act approved June 21 1938 because of the express exemption made by § 1(b) of that Act for the production or gathering of natural gas and because petitioner does not transport or sell natural gas in interstate commerce for resale within the meaning of that section.

The rendition by this Court June 7 1954 of its decision in *Phillips Petroleum Co.* v. *Wisconsin* 347 US 672 produced a series of administrative orders from the Federal Power Commission purporting to regulate all producers of natural gas on the theory that they are engaged in interstate commerce. No exception was made by these orders for those producers who, like petitioner are only producers (not transporters or gatherers) of natural gas. The first Order, made without notice to or hearing of petitioner or other producers, was issued July 16 1954. The amendatory Order 174-A was issued August 6 1954 (App. 60).[2] This series of orders required natural gas producers to file by December 1 1954 (originally October 1) all rate schedules in existence June 7 1954, and prohibited any changes in rate after June 7 1954 in all contracts whether executed before or after that date, thus effecting without notice or hearing a retroactive reduction of rates. They required natural gas producers to file with the Commission by December 1 (originally October 1) 1954 rate schedules setting forth terms and conditions of service and all rates and charges for

[2]A further amendatory Order 174-B, 19 Fed. Reg. 8807, was made December 17 1954 (App. 86), after issuance of the preliminary injunction in the District Court. This "modified and amended" but did not materially change Order 174-A.

transportation or sale effective on June 7 1954. They required natural gas producers to obtain certificates of public convenience and necessity pursuant to application to be filed by December 1 1954, and prohibited them from engaging in any new service with respect to the transportation of natural gas in interstate commerce or sale thereof for resale in interstate commerce without such certificate of public convenience and necessity. With respect to the application for the certificate the Orders were so designed as to compel confession of the Commission's jurisdiction over petitioner (App. 45-6, 72, 105-6)—a jurisdiction which petitioner denies to exist. Finally, these Orders forbade producers to abandon any sale, transportation or service subject to the jurisdiction of the Commission without its express permission and approval.

Inherent in these sweeping Orders was an ambiguity deliberately left unresolved, despite the protest of a dissenting Commissioner (App. 80 and 114-6). This inheres in the fact that the Orders purport to reach well-head sales of natural gas which are neither wholesale sales nor sales in interstate commerce for resale after gathering has intervened, although abstaining from an explicit statement to that effect.[3]

Petitioner had at the time of the issuance of these Orders about 169 contracts for the sale of natural gas produced by it at prices aggregating a large amount, and was and is engaged in continual exploration and drilling which brings in new fields and new production (R. 6, 21). Peti-

[3]By order issued March 9 1956 the Commission (Commissioners Stueck and Digby dissenting) initiated an investigation addressed to the question whether petitioner is a natural gas company. This action, taken six weeks after the Court of Appeals decision, was also 15 months after the District Court's injunction which the Commission has so persistently attacked, and was made pursuant to an express proviso which had stood therein from the beginning (R. 29).

tioner is subject to strict regulation and control in the states of Texas, Louisiana and Mississippi in which its producing wells are situated (R. 4-6). This State control extends to the method and manner of drilling and producing wells for oil and gas and governs the allowable production by the various wells (R. 4-6). In consequence petitioner can sell only such natural gas as the various State regulatory authorities authorize as legally producible within the allowable limits set by the respective regulatory agencies of the States.

In consequence of the Commission's Orders the arrival of the December 1 1954 deadline without petitioner's bringing itself under them by filing its rates and applying for a certificate of public convenience and necessity, confronted petitioner with a condition of commercial disaster (R. 9-10, 20-2). This is so because, under the menace of the penalties denounced for violation, all petitioner's contract customers would cut off relations and its sales of both existing and new production would be blocked (R. 10, 21-2). Acceptance by petitioner of the certificate of public convenience and necessity which the Orders require (R. 11), would on the other hand jeopardize its statutory immunity and subject it to a jurisdiction which it believes to be illegal.

On August 13 1954 petitioner filed an application for rehearing and stay of Order 174-A. A hearing was had on this and other similar applications September 22-3 1954, but no action had been taken by the Commission by the arrival of the December 1 1954 deadline. Whether or not so intended, this delay necessarily worked hand in glove with the compulsive character of the application for certificate above pointed out (p. 5). The result was to leave petitioner subject to the outstanding Orders with their

destructive effect upon all contract and customer relations and subject to the statutory penalties for non-compliance.

Under the compulsion of these circumstances petitioner on November 19 1954 filed in the District Court its plenary suit for injunction (R. 1-19), and the hearing on preliminary injunction was held November 30 1954. Such injunction was granted by order dated December 1 (R. 26-9), and the Commission's subsequent motion to dismiss was denied by order dated December 31 1954 (R. 46).

Ultimately petitioner's application for rehearing in the Commission was denied December 17 1954.

Reasons for Granting the Writ

The action of the Court of Appeals in reversing the District Court (one judge dissenting without opinion), should receive immediate review and correction at the hands of this Court because of its bringing into confusion and contradiction principles important in the administration of the Natural Gas Act (over and above the injustice done in the instant situation), as follows:

1.

The single ground of decision in the Court of Appeals, viz. that petitioner had not exhausted its administrative remedies (App. 28, R. 63), eliminates the equitable jurisdiction of the district courts in matters treated by any administrative agency, contrary to the rule laid down by this Court per Brandeis, J. in *Skinner & Eddy Corp.* v. *United States* 249 US 557, 562-3:

> "The contention is that the [Interstate Commerce] Commission has *exceeded its statutory powers; and that, hence, the order is void.* In such a case the

> courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co.* v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. The *Sacramento Case, supra* [242 U. S. 178], was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit." (Italics supplied)

The same principle is stated in *United States* v. *Interstate Commerce Commission* 337 US 426, 433-4; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.* 337 US 498, 515-6.

The verified, and uncontroverted, complaint asserts with particularization the illegality of the challenged Orders 174 and 174-A as applied to petitioner (R. 7-16). Hence the doctrine of exhaustion of administrative remedies plainly does not apply, and it is disruptive of the formulation of clear rules in this important field of administrative review for the court below to decide a case of this importance on the theory that that doctrine does apply in the circumstances here presented.

2.

In failing to recognize the asserted illegality of the Federal Power Commission's Orders as a ground for injunction thereagainst on the theory that petitioner should have gone further in seeking redress in the Commission, the

decision below is also in conflict with the decision of courts of appeals in the Sixth, Seventh and Ninth Circuits. *Varney* v. *Warehime* 147 F. 2d 238, 243 (CA 6 1945); *United States ex rel. De Lucia* v. *O'Donovan* 178 F. 2d 876 (CA 7 1949), petition for certiorari dismissed 340 US 886; *Koepke* v. *Fontecchio* 177 F. 2d 125 (CA 9 1949); *Dragna* v. *Landon* 209 F. 2d 26, 28 (CA 9 1953).

3.

The three cases cited by the Court of Appeals did not justify the result it reached, as concerns the exhaustion of administrative remedies. In *Myers* v. *Bethlehem Shipbuilding Corp.* 303 US 41 (cited App. 27) there was no claim that the proceedings of the administrative agency were illegal (p. 47). In *Aircraft & Diesel Corp.* v. *Hirsch* 331 US 752 (cited App. 27), which was "colored by the relevant specific provisions of the Renegotiation Acts" (p. 764), the statute gave the Tax Court exclusive jurisdiction, prohibited review by any court (p. 769), and expressly required exhaustion of the procedures provided thereby. In addition appellant there had an adequate remedy at law (p. 781). (Similarly, in *Whitehouse* v. *Illinois Central R. Co.* 349 US 366, not cited below, the only injury asserted by plaintiff was its being put to needless expense [p. 373].) *Eccles* v. *Peoples Bank* 333 US 426 (cited App. 28) presented no existing controversy, the Federal Reserve Board having informally disavowed any intention to invoke the condition complained of in the existing circumstances (p. 431).

Per contra the principle which should be deemed controlling on this record was stated by this Court in the *Eccles* case, 333 US at 434:

> "A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process."[4]

On the showing made below in the instant case there was inevitable injury of irreparable character (R. 3-4, 9-10, 20-2) in the destruction of contract relations and future business of inestimable value. There was also the coercion of heavy penalties consisting of a fine up to $5,000 or two years' imprisonment or both together with additional fines up to $500 for each day of violation of the Commission's regulations (Natural Gas Act § 21, App. 137). These sanctions of themselves in the circumstances are a ground for equitable jurisdiction, as many times declared by this Court *Ex Parte Young* 209 US 123, 147-8; *Stafford* v. *Wallace* 258 US 495, 512; *Terrace* v. *Thompson* 263 US 197, 214; *Philadelphia Company* v. *Stimson* 223 US 605, 621; *Shields* v. *Utah Idaho Central R. Co.* 305 US 177, 183.

Notwithstanding this current of authority, the court below plainly declined to pass on petitioner's claim of irreparable injury on the ground that to do so "is not necessary under the circumstances of this case" (App. 29). We submit with deference that the majority below here confess error. If this be a correct application of law under the circumstances shown by this record, the doctrine of exhaustion of administrative remedies will have eaten up virtually the whole of the equitable jurisdiction of the district courts with respect to any matter on the docket of an administrative agency.

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[4]Here the record discloses no uncompleted administrative process

The District Court, in exercising its discretion in favor of preliminary injunction and in its opinion sustaining the complaint (R. 36-45), properly balanced the equities in accordance with basic principles and the established landmarks of the law. The majority in the Court of Appeals, in reversing these determinations and directing dismissal of the action, deprived petitioner of all remedy in a situation of threatened irreparable injury arising from destruction of its relations with customers, as we have sought to point out (p. 6 above). It thereby violated rules laid down by applicable decisions of this Court. These rules recognize the equity raised by coercive penalties (*Ex Parte Young* 209 US 123, and other cases cited at p. 10 above) and irreparable damage due to illegal administrative action (*Ohio Oil Co.* v. *Conway* 279 US 813, 815; *Joint Anti-Fascist Refugee Committee* v. *McGrath* 341 US 123; *Federal Communications Commission* v. *American Broadcasting Co.* 347 US 284; *Columbia Broadcasting System* v. *United States* 316 US 407).

The *Columbia Broadcasting* case, in which this Court reversed a three-judge statutory court (44 F. Supp. 688), aptly states in closely comparable circumstances the rule which the court below ought to have applied. That was a plenary action in equity to enjoin enforcement as to plaintiff of regulations of the Federal Communications Commission, claimed by the Commission to be rule-making only, on the theory that these impaired substantive rights even though not directed to any particular person or corporation. The regulations dealt with chain broadcasting. They stated a general policy to govern the exercise of the Commission's licensing power, and provided that no license would be granted to a broadcasting station which made contracts containing certain described provisions with any network

organization. Plaintiff claimed these orders were disruptive of its business. The Commission said they were not in reality orders but merely announcements of a course to be pursued in the future on license applications. The District Court agreed that the regulations neither directed anyone to do anything nor finally adjudicated a fact to exist upon which some right or duty immediately depended, and held they were nothing more than a declaration or threat of future action (44 F. Supp. at 691-2). In dismissing these contentions and directing injunctive relief Chief Justice Stone for a unanimous Court laid down the rule which we believe still to be the law[5] (316 US at 422-3):

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act [the instant case being *a fortiori* in that it involves penalties also]. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked. *Chicago Junction Case,* 264 U. S. 258, 266-68; *Western Pacific R. Co.* v. *Southern Pacific Co., supra; Clairborne-Annapolis Ferry Co.* v. *United States, supra;* compare, in the case of an attack upon the validity of a statute, *Truax* v. *Raich,* 239 U. S. 33, 38-39; *Pierce* v. *Society of Sisters,* 268 U. S. 510."

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[5]Cited and followed in *Joint Anti-Fascist Refugee Committee* v. *McGrath* 341 US 123, 141; followed without being cited in *Federal Communications Commission* v. *American Broadcasting Co.* 347 US 284.

Just so in the instant case the 174 series of Orders alter and affect adversely petitioner's business relations with customers whose existing and prospective purchase contracts with petitioner such Orders will cause to be terminated lest these customers be subjected to penalty for violation of the Natural Gas Act by doing business with petitioner. They make petitioner an outlaw.

Again Chief Justice Stone lays down this criterion (316 US at 425):

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

In the same way the 174 series of orders attach legal consequences to actions (viz. the making or failing to make application for certificate of public convenience and necessity) in advance of other hearings, and invalidate petitioner's rates in so far as higher than the June 7 1954 level.

The majority below felt the *Columbia Broadasting* case not pertinent because it did not involve the question of plaintiff's status (App. 27). No such distinction is warranted.

On the one hand, the regulations in *Columbia Broadcasting* did not purport to determine the status of CBS, just as in the instant case both the respondent Commission and the Court below have asserted that the 174 series of Orders do not determine the status of petitioner because

petitioner is not mentioned therein by name.[6] On the other hand, in threatening disruption of valuable contract relations of the Columbia company the chain broadcasting regulations did affect its "status" as a company thus indirectly subjected to the licensing powers of the Federal Communications Commission, in the same way that the administrative orders here involved attain the same result by threatening to impair and destroy all petitioner's contracts for sale of natural gas as of December 1 1954 in the absence of a certificate of public convenience and necessity which would subject petitioner to an asserted illegal jurisdiction.

In addition the instant case presents the further factor not present in the *Columbia Broadcasting* case, of oppressive penalties operating to coerce obedience and deprive petitioner of its constitutional and statutory right to hearing and determination (p. 11 above; see also *Rochester Telephone Corp.* v. *United States* 307 US 125, 132). In a matter of declaratory judgment against the Immigration and Naturalization Service this Court has most recently declared the existence of a case and controversy as against a claim by an administrative agency of non-justiciable status in *Nukk* v. *Shaughnessy* 350 US 869 (1955), reversing 125 F. Supp. 498.

4.

The administrative orders against which injunctive relief is sought by petitioner were made without due notice and hearing in violation of the Administrative Procedure Act and petitioner's rights under the Fifth Amendment.

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[6]Curiously enough and inconsistently with its own statement about *Columbia Broadcasting* (App. 27), the majority below actually stated: "The company [petitioner] claims that its status has been erroneously predetermined. We think there is no showing that this is so" (App. 28).

The requirements of § 4 of the Act as to notice and public procedure thereon were not met by the Commission, nor was there the "good cause" for dispensing with them which the statute exacts. The requirements of § 4(c), as to effective date of substantive rules to be thirty days after notice, were flouted by provisions of both Orders 174 and 174-A which *relate back* to June 7 1954 (R. 83, 103; App. 36, 62).

These provisions were clearly beyond any statutory power of the Commission, as most recently pointed out by this Court in *Federal Power Commission* v. *Sierra Pacific Power Company,* October Term 1955, Nos. 51 and 53, 24 Law Week 4094, 4095 (filed February 27 1956, and not yet officially reported). In fact this particular provision of the 174 series of orders has been held to be invalid; see *Phillips Petroleum Co.* v. *Federal Power Commission* 227 F. 2d 470 (Nov. 1955), petition for certiorari filed in this Court February 13 1956 No. 684. The Commission's attempt to predicate "good cause" on the fact that June 7 1954 was the date of this Court's decision in the *Phillips* case and the argument that failure to antedate required performance under the Orders would put natural gas producers in violation of the Natural Gas Act (R. 64; App. 35), cannot stand when it is realized that this Court's decision in the *Phillips* case gives the meaning of the statute as it has been ever since enactment in 1938.

5.

Contrary to the rule laid down by this Court in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.* 317 US 456, 464, the Orders herein sought to be enjoined provide for the fixing of rates retroactively. They purport to require all "natural gas companies" (petitioner among

them) to file as initial rate schedules those rates which were in effect June 7 1954 irrespective of the level of rates at the time the Orders were issued. They seek to prevent the companies from changing their June 7 1954 rates without first filing an application for change of rates pursuant to § 4(d). Hence the Orders sought to be enjoined impose a retroactive freeze of rates to the level in effect at the time of this Court's decision in the *Phillips* case (see §§ 154.92 and 154.94 of Order 174-A, R. 83, 84, App. 62, 64).

Such provisions are in direct violation of the Natural Gas Act. Section 4(c) says that the natural gas company may file initial rates in conformity with rules and regulations of the Commission; §§ 4(d) and (e) authorize filing of changes in the schedules 30 days in advance of their effective date; and § 5(a) defines the powers of the Commission to reduce rates after full hearing. No retroactive fixing of rates by the Commission is envisaged by this statutory scheme, *Federal Power Commission* v. *Hope Natural Gas Co.* 320 US 591, 618; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission* 341 US 246.

6.

A fundamental issue in petitioner's prayer for injunctive relief which the majority below has now directed to be dismissed is the conflict of the Federal jurisdiction asserted over petitioner by Orders 174 and 174-A with the basic State jurisdictions to which petitioner is inescapably subjected in its operations in Texas, Louisiana and Mississippi respectively.

Petitioner has for more than 20 years been engaged in the production of oil and natural gas under the laws and regulations of these three States in which its wells are located (R. 4-5). Agencies of those States regulate not only

the method and manner of petitioner's drilling wells but also the amount of gas which may be produced from each well (R. 4-5, 6, 22-5), the regulation of casing head gas being made without regard to its volume because it is associated as the motive power in production of oil. Pro-ration schedules and oil production in the three States vary from month to month, and the regulation extends to the creation of pooling units or unitization procedures where necessary to effect secondary recovery operations for oil or gas such as cycling, recycling, repressuring, water flooding, pressure maintenance, etc. (R. 5). The three States by their respective regulatory commissions declare illegal all oil and gas produced in excess of the "allowable" determined by their controls in monthly quantities (R. 4, 22). Severe penalties are provided for violation (R. 5).

Such provisions of the Orders sought to be enjoined as forbid abandonment of service (§ 157.28 of Order 174-A, R. 91) would (save for the injunction now directed to be vacated, R. 26) involve petitioner in direct conflict between the Federal and State jurisdictions. This result flagrantly offends the Congressional purpose to recognize and preserve the primary jurisdiction of the States over production and gathering of natural gas, as remarked by this Court in *Federal Power Commission* v. *Hope Natural Gas Co.* 320 US 591, 612-3; *Interstate Natural Gas Co.* v. *Federal Power Commission* 331 US 682, 690; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* 337 US 498, 502-4.

Particularly relevant to the position of this petitioner as *exclusively a producer* of natural gas, not engaged in gathering or transportation, is the statement of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* 337 US 498, at 502:

> "Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. . . ."

In holding that the Commission had no power under § 7(b) of the Act to trespass upon the primary State jurisdiction, the Court further said (pp. 509-13):

> "The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. *The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution.* It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views." (Italics supplied.)

Orders 174 and 174-A as respects petitioner, a producer engaged in production only, under the regulation of three States,[7] threaten this delicate balance of governmental in-

[7]It is true that the Commission on December 17 1954, (viz., *after* petitioner had invoked the equitable jurisdiction and obtained its injunction) sought to eliminate the ground of objection just described, by a proviso in Order 174-B that nothing in the rules shall be construed as preventing compliance with "valid" conservation orders of a state agency relative to the production of natural gas (Order 174-B § 157.28 at App. 110). It can be demonstrated upon review here,

terests in ways so important as to require the interposition of this Court by an immediate review.

Conclusion

For the foregoing reasons, it is urged that the Court of Appeals for the District of Columbia has——

denied petitioner its basic right to equitable protection under the standards laid down by the applicable decisions of this Court and by the Administrative Procedure Act and the Fifth Amendment,

misconstrued and misapplied the Natural Gas Act,

extended the doctrine of exhaustion of administrative remedies to the virtual destruction of these equitable rights,

thrown into confusion important questions of judicial review of administrative agencies, and

involved in conflict the Federal and State jurisdictions in the apportionment of regulatory powers over natural gas,—

in contravention of applicable decisions of this Court and in conflict with decisions of the Courts of Appeals of other Circuits.

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we believe, that this attempted modification is of no value. It recognizes the conflict but does not eliminate it. No hearing of the Federal Power Commission, with its calendars already so heavily loaded, could possibly be had in conformity with month-to-month schedules of the Louisiana and Texas regulatory agencies controlling the production of natural gas by this petitioner.

WHEREFORE it is prayed that a writ of certiorari issue accordingly for a review by this Court of the questions so presented.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 792

UNION PRODUCING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, et al.,
Respondents.

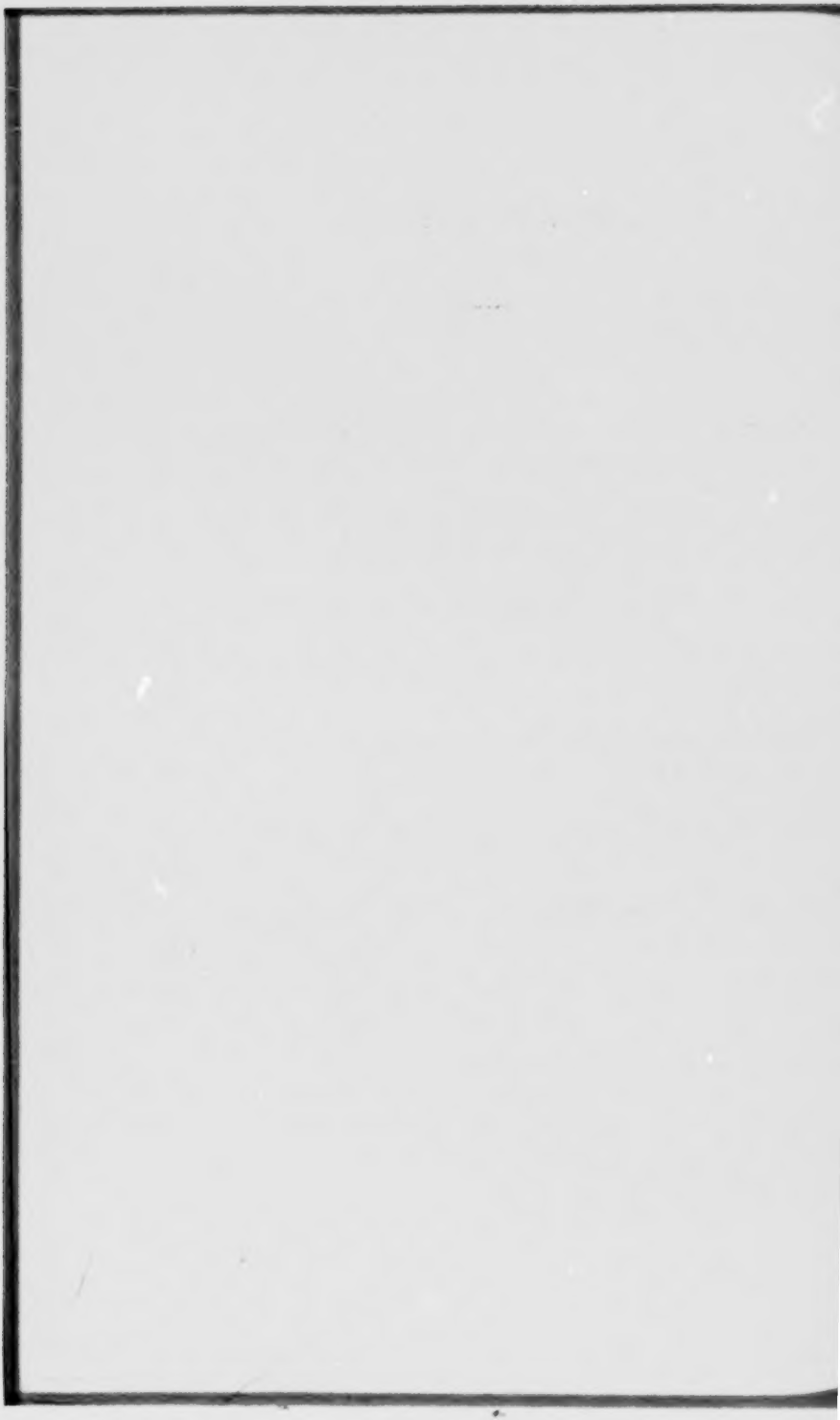
APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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New York, N. Y.
March 23, 1956

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Opinion of Court of Appeals for District of Columbia Circuit, January 30 1956

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,583-4

FEDERAL POWER COMMISSION, et al., APPELLANTS

v.

UNION PRODUCING COMPANY, APPELLEE

Appeals from the United States District Court for the District of Columbia

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Decided January 30, 1956

Mr. William J. Grove, Assistant General Counsel, Federal Power Commission, with whom *Messrs. Willard W. Gatchell,* General Counsel, Federal Power Commission, and *Robert L. Russell,* Attorney, Federal Power Commission, were on the brief, for appellants.

Mr. Thomas Fletcher, of the bar of the Supreme Court of Texas, *pro hac vice,* by special leave of Court, with whom *Messrs. C. Huffman Lewis and Morton E. Yohalem* were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

Opinion of Court of Appeals for District of Columbia Circuit, January 30 1956

BASTIAN, *Circuit Judge:* The defendants in the trial court were the Federal Power Commission and its members, to whom Congress has delegated the administration of the Natural Gas Act. 52 Stat. 821, 15 U. S. C. § 717.

In its complaint in the trial court Union Producing Company, engaged in the production and gathering of oil and natural gas, claims that the Natural Gas Act is inapplicable to its wellhead sales of natural gas and sales of natural gas for processing, and seeks to enjoin the enforcement of certain regulations promulgated by the defendant Commission and now designated as Order 174-B,[1] requiring the filing of rate schedules and applications for certificates of public convenience and necessity. The company alleges that this order results in an arbitrary and unreasonable interference with its existing contractual relationships, and impairs the obligation of contracts in violation of the Constitution, depriving the company of due process of law in violation of the Fifth Amendment and contrary to the provisions of the Administrative Procedure Act.

More specifically, the company alleges that it presently has a large number of sales contracts involving a substantial dollar aggregate and, as a producer, is constantly bringing in new fields and wells which, in turn, involve

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[1]Order No. 174-B is entitled "Order amending Order Prescribing Regulations Governing the Filing of Rate Schedules and Applications for Certificates of Public Convenience and Necessity by Producers and Gatherers of Natural Gas Which Are Also Natural Gas Companies, Waiving Accounting Requirements, and Relating to Automatic Escalation and Favored Nation Clauses in Contracts for the Sale of Natural Gas by Such Producers and Gatherers."

new sales of gas produced. The company also alleges that under compulsion of Order 174-B it is subjected to loss of customers and other economic sanctions already incurred and threatening to arise in greater measure from prospective customers declining to deal with it; that it faces the problem of third party contractors refusing to pay the increased prices called for by contract and refusing to make reimbursement of taxes advanced by the company under contract and from the loss of benefit of escalation provisions in existing contracts, as well as the threatened inability to dispose of future supplies of natural gas produced by it. Furthermore, the company states that failure to comply with the newly promulgated regulations of the Commission will subject it unduly to the risk and threat of severe fines and penalties provided by the Natural Gas Act.

The entire controversy in these cases revolves around the decision of the Supreme Court in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U. S. 672 (1954), affirming the decision of this court in *State of Wisconsin* v. *Federal Power Commission*, 92 U. S. App. D. C. 284, 205 F. 2d 706, which reversed the decision of the Federal Power Commission In the Matter of *Phillips Petroleum Co.*, 10 F. P. C. 246, 90 P. U. R. (N. S.) 325 (1951). The series of orders designated as Order Nos. 174, 174-A and 174-B stem directly from the decision in the *Phillips* case, *supra*, and were promulgated by the Commission to adapt the Commission's rules and regulations to that decision. Following the decision of the Supreme Court on June 7, 1954, the Commission, on July 16, 1954, issued Order No.

174[2] prescribing procedural rules of general applicability to those persons, "independent producers and gatherers," determined by that decision to be within the purview of the Natural Gas Act and subject to the jurisdiction of the Commission. The rules and regulations comprising the series of 174-Orders amend the Commission's rules and regulations and provide means by which a "natural gas company" in the producing and gathering area of the business, as contrasted to an interstate pipeline "natural gas company," could comply with the requirements of the Natural Gas Act.

The provisions of the Natural Gas Act, which the 174-Orders were designed to implement, are embodied in Sections 4, 7 and 8 of the Act. Section 4(c) requires every natural gas company to file with the Commission schedules of its rates and charges in such form as the Commission may designate and prescribe in its regulations. Section 4(d) prohibits changes in rates except after 30 days' notice to the Commission and the public. Section 7(b) forbids the abandonment of facilities or service without the permission and approval of the Commission first being obtained. Section 7(c) prohibits engagement in operations subject to the Commission's jurisdiction unless a certificate of public convenience and necessity has been obtained from the Commission. Section 7(d) requires that applications for certificates be filed in such form, and notice thereof given, as the Com-

[2]Order No. 174, 19 F. R. 4534, July 2, 1954, was superseded by Order No. 174-A, 19 F. R. 5081, August 12, 1954, which was later amended and restated as Order No. 174-B, 19 F. R. 8807, December 23, 1954.

mission may require. Section 8(a) authorizes the Commission to prescribe a system of accounts and classification of companies, and requires every natural gas company to conform its accounts thereto. Section 16 of the Act authorizes the Commission to prescribe such orders, rules and regulations as it finds necessary to carry out the provisions of the Natural Gas Act.

Order 174-B now embodies the effective rules and regulations applicable to rates and certificate application filings by "independent producers." Throughout the 174 series of orders the definition of "independent producers" has remained unchanged. Each order, in succession, has been made applicable to the operations and transactions conducted by an "independent producer" as of June 7, 1954, the date of the Supreme Court decision in the *Phillips* case, and each order required rate and certificate application filings to be made with the Commission not later than December 1, 1954.

The company points out that, except for a few isolated instances of state-controlled unitization, it sells natural gas at the wellhead or at the downstream side of a separator located adjacent to the wellhead; that it does not gather such gas but, rather, that the gathering is done by those who purchase from the company; that the company does not own any processing plants through which the gas may be processed or from which gas is sold by it, nor does it purchase natural gas from any other producer for resale or processing. Furthermore, the company alleges that it does not engage in interstate transportation of natural gas; that title to the gas passes at the

point of delivery; that it has no control over the gas after delivery; and that it does not know what disposition is made by the purchaser after delivery. The company contends that since all its sales are made in the course of production and prior to gathering by third parties, it is not a natural gas company as defined in the Natural Gas Act.

The trial judge found in favor of the company, concluding that the suits might be maintained, granted a preliminary injunction, and denied the motion of the Government to dismiss. The court held in these cases that the remedy of injunction is available to the plaintiff company under the Administrative Procedure Act.

It appears from a reading of the record that a number of "gas-gathering" companies, uncertain as to their status under the new regulations, Orders 174, 174-A and 174-B, have taken advantage of the Commission's Rule, Section 1.7(c),[3] and have filed petitions for a declaratory order to have their status determined.

The statutory scheme in a judicial review of the Federal Power Commission action contemplates an initial decision by the agency, followed by court review. Reasons

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[3]Section 1.7(c) provides: "[Petitions] *For declaratory orders.* Petitions for the issuance in the discretion of the Commission, of a declaratory order to terminate a controversy or remove uncertainty, shall state clearly and concisely the controversy or uncertainty which is the subject of the petition, shall cite the stautory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petiton, together with a full disclosure of petitioner's interest, and shall conform to the requirements of §§ 1.15 and 1.16." (18 CFR 1.7(c).)

of uniformity of decision, based on the expertise of a specialized agency, underlie this scheme.

The company relies on *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. However, this case did not involve the question of CBS' status. That was already clear. The relief asked by CBS was not the securing of a determination as to whether or not certain transactions (and CBS as a participant) were within the terms of the Federal Communications Commission regulations. CBS wanted a court ruling that the regulations in their entirety were outside the agency's statutory authority. The Supreme Court determined (1) that it was considering an "order" in that the rules and regulations in question impaired existing contracts and obligations, and (2) that these rules and regulations operated to control in advance the rights not only of licensees but also of others, the broadcasting networks. The only action remaining in the CBS case was the enforcement by the Commission of the regulations against a station licensee.

In the instant case, however, it seems to us that the real request of the company is to have particular transactions classified as outside the Act and the regulations. This cannot be done until the agency has passed on the question. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938).[4] Where means are provided for obtaining administrative determination as to whether the plaintiff companies are subject to rules and regulations of the Commission, those means must be resorted to prior to judicial

[4]Cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752 (1946).

review. Certainly, we cannot assume that an exercise of those means would be a useless task, for that assumption would necessarily be pitched on a presumption that the Commission is derelict in its duties under the Constitution and the Natural Gas Act.

The company has not exhausted its administrative remedy. Its petitions before the Commission were chiefly directed to the order as a whole. It could not properly raise the question whether the order would apply to particular situations, except perhaps to show a need for clarification. The Commission took the view that such questions must wait. This was a reasonable attitude. A petition for declaratory ruling from the Commission (under Section 1.7(c) of the Rules) would seem to be the appropriate remedy. Union did not ask for this.

The company claims that its status has been erroneously predetermined. We think there is no showing that this is so. In any event, *Eccles* v. *Peoples Bank*, 333 U. S. 426, 434 (1947), point out that:

> "Where administrative intention is expressed but has not yet come to fruition (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324), or where that intention is unknown (*Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 429-30), we have held that the controversy is not yet ripe for equitable intervention."

As we hold that the suit must fail because the administrative remedies have not been exhausted and as the District Court thereby lacked jurisdiction over the subject

matter, it is not necessary under the circumstances of this case that we pass on the claim of "irreparable injury."

In view of the foregoing we must reverse and remand the case with directions to vacate the preliminary injunction and to dismiss the complaint.

Reversed and remanded.

WILBUR K. MILLER, *Circuit Judge,* dissents.

Opinion of United States District Court for the District of Columbia, November 30, 1954

The Court. At this stage of the litigation it would be premature for the Court to decide the question of law bearing upon the validity of the order of the Federal Power Commission that is under scrutiny here, or the question whether the plaintiff is within the terms of the statute as construed by the Supreme Court in the Phillips case. Suffice it to say that the verified complaint in this action raises debatable questions of law as to both of those matters.

The application for a preliminary injunction is necessarily addressed to the discretion of the Court, and it is the duty of the Court to determine it on the balance of convenience, as the phrase is. Should the plaintiff fail to comply and thus take the risk of future favorable or unfavorable decision as to the legality of the order and plaintiff's liability to regulation under the statute, the plaintiff runs the hazard, if it make an erroneous choice of the course to follow, of being subjected to very onerous penalties as well as to various economic sanctions not only from the Commission but by way of loss of customers. On the other hand, there is no showing on the part of the defendants that the Government would be in any way prejudiced by the granting of an injunction during the pendency of this action which would protect the plaintiff against incurring onerous penalties and running the risk of other hardships, and which would permit an orderly determination of the serious questions of law that have been raised here.

On the question of exhaustion of administrative remedies, the Court is not unmindful of the fact that a petition

for rehearing has been filed before the Commission by the plaintiff, as appears from the complaint. But this petition has not been determined by the Commission, although the order is to go into effect tomorrow. It seems to the Court that the case of Columbia Broadcasting System versus United States, 316 U. S. 407, is applicable.

The Court is of the opinion, however, that it should not interfere with any proceeding that the Commission wishes to take within its own organization in order to make an administrative determination of the question whether the plaintiff is subject to the statute and to the order. Accordingly the Court will grant the preliminary injunction as prayed for, except that it will not restrain the Commission from making any administrative determination in any administrative proceeding before it.

The Court might also call attention to the fact that the granting of this preliminary injunction should not unduly prolong this litigation, because it is quite apparent to the Court that these questions can be determined very promptly, either by motion to dismiss or by motion for summary judgment, and probably will not require a trial on the merits.

A preliminary injunction will be granted, with the exception indicated. You may submit an order and proposed findings and conclusions of law.

Mr. Grove. May I ask the Court whether the injunction will specifically contain the prohibition or injunction against enforcement of the Natural Gas Act, in so many words?

The Court. Only as against the plaintiff.

Mr. Grove. The administration of the act as against the plaintiff?

The Court. Yes, during the pendency of this action.

Mr. Grove. That would mean, then, if the Court please, that it would be free to act completely without regard to the act? It would mean the plaintiff would be completely free to act, to continue its business?

The Court. Until the termination of the litigation. After all, until the past year you thought the plaintiff was not under the act, and so held. So I don't think the interests of the public will suffer if the passage of a few more months is permitted before the act is made applicable.

Mr. Grove. I might state to the Court we filed a motion this morning to dismiss.

Order 174 of Federal Power Commission, July 16 1954

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith and Seaborn L. Digby.

In the Matter of	
Compliance by natural-gas producers and gatherers with certificate and rate requirements	Docket No. R-138

ORDER NO. 174

REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

All natural-gas companies subject to the Natural Gas Act are required by Section 7 thereof to obtain a certificate of public convenience and necessity before engaging in or discontinuing any transportation or sale of natural gas subject to the jurisdiction of the Commission, and by Section 4 of the Act they are required to file schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission. These

companies are also subject to the jurisdiction of the Commission as to their accounts and reports. The decision of the United States Supreme Court on June 7, 1954 in *Phillips Petroleum Company* v. *Wisconsin,* et al. (347 U. S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or makes sales in interstate commerce for resale are "natural-gas companies" subject to all the requirements of the Natural Gas Act. This decision affirms the decision of the United States Court of Appeals for the District of Columbia Circuit in *Wisconsin* v. *F. P. C.,* 205 F. 2d 705 (May 22, 1953), and reverses the holding of the Commission in Opinion No. 217, *Phillips Petroleum Company,* August 22, 1951 (90 P. U. R. (NS) 325).

The rules and regulations heretofore adopted by the Commission pursuant to Sections 4 and 7 of the Act have been directed principally to interstate pipeline companies. Those producers and gatherers which come within the class found by the United States Supreme Court in the *Phillips* case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a reasonable cut-off date should be fixed in order to avoid confusion in attempting to readjust past transactions. Therefore, we have determined to provide in the first instance,

and subject to our further order, reasonably simple rules and regulations applicable to these companies. For these and other reasons, good cause exists for making the rules and regulations herein adopted effective on less than 30 days' notice and for making such rules and regulations applicable to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court decision in the *Phillips Petroleum Company* case.

Although the decision of the Supreme Court is, of itself, notice to all "independent producers," as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.

Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth.

Wherefore, in accordance with the foregoing and pursuant to the authority vested in it by the Natural Gas Act (52 Stat. 821-833; 15 U. S. C. 717-717w) and particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U. S. C. 717c, 717f and 717w), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. 1002, 1003), the Commission *orders:*

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto the following new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.* —An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*— (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.93 *Rate Schedule Defined*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable

on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file

with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, but prior to September 15, 1954, may be filed within said period without thirty days' prior notice, which notice is hereby waived. If the Commission in any case shall find it necessary to suspend any such proposed change, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then ef-

fective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.95 *Oral Agreements*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission.

§ 154.96 *Filing Date*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance

with the requirements of Sections 154.91 through 154.13 of these Regulations.

§ 154.97 *Cancellation or Termination*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 *Number of Copies*—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Can-

cellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§154.100 *Rejection of Rate Schedules and Material Submitted for Filing*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101 *Acceptance for Filing not Approval*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Posting* — Any company required to file rate schedules pursuant to Sections 154.91 through 154.103 shall make such

rate schedules available to any party for inspection at the company's main offices during regular business hours.

§ 154.103 *Applicability of Sections 154.91 through 154.102*—Sections 154.91 through 154.102 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act as amended—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, be amended by adding thereto the following new sections reading as follows:

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer*—(a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application in accordance with Sections 157.24 through 157.28. Independent producers whose sales of natural gas subject to the jurisdiction

of the Commission amount to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954 the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale, first had and obtained pursuant to this Section; Provided, however, that independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file the information called for by the attached Exhibit A. In instances where a certificate of public convenience and necessity is required of a natural-gas company to enable it to receive or purchase natural gas from another natural gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously.

§ 157.24 *Contents of application.* (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof, for continued operation based on bona fide operations on June 7, 1954, shall be filed with the Commission on or before October 1, 1954, and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the state or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all states where applicant is authorized to do business.

(2) The same data required by paragraph (a) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest

of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, and that applicant is entitled to a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act as amended. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was accomplished.

(iii) The communities actually served on June 7, 1954, (a) at wholesale and (b) at retail.

(iv) The names of, and points of delivery to, main line industrial customers (i.e., not located within communities under (iii) above) purchasing 25,000 M.c.f. or more per year. Such main line industrial customers, purchas-

ing 100,000 M.c.f. or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Notice of the application shall be given by applicant by service of a true copy of the application (without the exhibits provided for in § 157.25) upon the state regulatory commission, agency, or official having authority to regulate the transportation or sale of gas in every state in which applicant operated on June 7, 1954, or upon the governor of the state when there was no such state regulatory commission, agency, or official, by delivery of said copy in person or by registered mail.

§ 157.25 *Necessary exhibits.* There shall be filed with the application as a part thereof the following exhibits. Any information required which is already on file with the Commission may be incorporated by reference. If applicant is unable to file any designated exhibit on or before October 1, 1954, a statement setting forth the reasons for such failure should be submitted in lieu of the appropriate lettered exhibit and a further extention of

time for filing the exhibit, not to exceed 90 days, may be granted by the Commission. The following required exhibits are designed to amplify paragraphs (a) and (b) of § 157.24.

Exhibit A. If applicant is a corporation, a certified copy or photostat of its articles of incorporation and by-laws.

Exhibit A-1. If applicant is a corporation, certified copies or photostats of any and all evidences of domestication in or authorization to do business in any state or states other than the state of incorporation involved in the application.

Exhibit A-2. If applicant is an individual, or group of individuals, satisfactory proof of the citizenship of such individual or individuals.

Exhibit A-3. A certified copy or photostat of the resolution of the board of directors or other similar legal authority authorizing the filing of the application.

Exhibit B. A general key map of applicant's facilities in use on June 7, 1954, for the production, transportation, or sale of natural gas showing:

(a) The location of gas fields from which gas is produced by applicant or affiliated companies or at which gas is purchased by applicant.

(b) The location of applicant's pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served at wholesale and at retail, indicating those served at wholesale by a small square and those at retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 M.c.f. or more per year. Such main line industrial customers are to be designated I-1, I-2, etc. as indicated in § 157.24(a)(4)(iv).

The map should be of sufficient scale and in sufficient detail to show the geographical location of the properties. Applicant may be required to furnish the Commission with additional alignment or field maps in support of the application.

Every natural-gas company is hereby ordered and required to keep on hand in its offices subsidiary alignment and field maps properly marked and maintained showing all the facts required in connection with Exhibit B above with sufficient certainty to establish

beyond doubt the extent and location of its said facilities in use on June 7, 1954, and to be prepared to furnish information relative thereto or copies thereof at any time to the Commission.

Exhibit C. The applicant may submit as many additional exhibits as may be deemed essential for consideration of the application. Such exhibits may be identified as Exhibit D, etc., or may be given sub-numbers, such as Exhibit B-1, etc., as appropriate.

§ 157.26 *Form of filing.* An application under §§ 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other information.* The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service*—No independent producer as defined in Section 154.91 of these Rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954 without the express permission and approval of the Commission

first had and obtained in accordance with Section 7(b) of the Natural Gas Act.

§ 157.29 *Applicability of Sections 157.23 to 157.28*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The rules and regulations herein prescribed be and they are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) The Secretary of the Commission shall cause publication of this order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

LEON M. FUQUAY,
Secretary.

Adopted: July 15, 1954

Issued: July 16, 1954

Exhibit A

SUGGESTED FORM FOR APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY CLASS B INDEPENDENT PRODUCERS[1]

(1) Name of Applicant .....
(2) State of Organization .....
(3) Location of Principal Place of Business .....
(4) Names of States in Which Authorized to do Business .....
.....

(5) Person Responsible for Application:
  (a) Name and Title .....
  (b) Mailing Address .....

(6) Description of Facilities Used for Operations for Which Certificate is Requested (where applicable).
  (a) Pipelines.
    (i) Location .....
    (ii) Length and diameter .....
    (iii) Capacity (Mcf daily) .....
  (b) Compressor Stations.
    (i) Location .....
    (ii) Horsepower .....
    (iii) Capacity (Mcf daily) .....
  (c) Gasoline Plants.
    (i) Location .....
    (ii) Capacity (Mcf daily) .....
  (d) Dehydration Plants.
    (i) Location .....
    (ii) Capacity (Mcf daily) .....

[1]Independent producers defined in section 154.91 as transporting in interstate commerce or selling in interstate commerce for resale a total of less than 1,000,000 Mcf per year of natural gas.

(e) Purification Plants.

(i) Location .....

(ii) Capacity (daily) .....

(f) Storage Projects.

(i) Location .....

(ii) Maximum volumes that can be stored Mcf .....

(7) Gas Supply.

(a) Own Production:

(i) Name and location of field .....

(ii) Acreage controlled .....

(iii) Estimated gas reserve in place .....

(b) Gas Purchased:

(i) Name of seller .....

(ii) Name and location of field .....

(iii) Estimated gas reserve in place .....

(iv) Point of delivery to applicant .....

(8) Gas Sales or Transportation Contracts (for each contract).[1]

(a) Name of purchaser .....

(b) Point of delivery .....

(c) Contract volumes Mcf (daily or annually), indicating pressure base .....

(d) Price at time of filing .....

(e) Date of contract .....

(f) Term of contract .....

(g) Special conditions (if any) .....

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[1]Contracts on file as rate schedules may be incorporated by reference.

In the Matter of	
Compliance by natural-gas producers and gatherers with certificate and rate requirements	Docket No. R-138

DIGBY, Commissioner, *dissenting:*

I find it necessary to dissent from the conclusions by the majority of the Commission in connection with Order No. 174 dealing with the Commission's regulation of independent producers and gatherers of natural gas as defined in said Order and occasioned by the decree of the United States Supreme Court in the Phillips case.

In approaching our responsibilities in connection with the added jurisdiction of the Federal Power Commission over producers and gatherers of gas as outlined in the recent Supreme Court decision, it should be realized that we are dealing with the seventh largest industry in this country and that millions of consumers may be directly affected by our approach to this matter.

It is my opinion that the majority of the Commission has exceeded its rule-making authority in adopting this *ex parte* and unilateral order. The effect of this order will not only fix rates retroactively to June 7, 1954, but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954. Any retroactive date is arbitrary. There would be as much sanction in law for making these regulations retroactive to the effective date of the Natural Gas Act in 1938 as any other retroactive

date. This, in my opinion, is in violation of the express provisions of the Natural Gas Act which prohibits the fixing of rates retroactively. I also feel that the Order may have the effect of depriving the producers of the provisions of Section 4 of the Natural Gas Act. Under Section 4 of the Natural Gas Act, a natural-gas company may file an increased rate with the Commission, which rate can be suspended by the Commission for a period not to exceed five months after which time the company may collect the increased rate under bond awaiting a final determination by the Commission. In freezing the producer's rate as of June 7, 1954, they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954. Further, original tariffs or rates cannot be suspended by the Commission and the company is entitled under the law to collect the filed rate at least until after an investigation by the Commission with a final determination concerning the rate. In these particulars, at least, it is my opinion that the Order adopted by the majority of the Commission may deprive independent producers, as defined in that Order, of their right of due process of law. The Order adopted by the majority of the Commission requires all independent producers who were selling gas into interstate commerce on June 7, 1954, to file with the Commission their sales contracts as of June 7, 1954. The Order further requires all of these producers to make application to the Commission for certificates of public convenience and necessity authorizing each and every separate sale in interstate commerce. It has been repeatedly stated that there are 2,300 such independent producers. Most of

these producers who are selling gas in interstate commerce will have an average of three separate sales which would require a minimum of 6,000 applications for certificates of public convenience and necessity to be filed with the Federal Power Commission not later than October 1, 1954, and this in addition to the filing of all sales contracts under the rate provisions of the Order. From the records on file with this Commission, it appears that about 80% of all the gas being sold in interstate commerce is sold by approximately 61 companies and that the remaining 20% is sold by over 2,000 small producers in twenty States. It seems to me that a more prudent approach to our regulatory responsibility would call for the institution of separate proceedings in connection with the 61 companies selling 80% of the natural gas with the right afforded to these companies of a public hearing under an order dealing with the rights of the parties in a prospective manner and not imposing regulations retroactively. By requiring the immediate filing of rate schedules and applications for certificates of public convenience and necessity authorizing each sale, I fear the Commission will be unable to see the forest for the trees. I do not suggest that the smaller producers be excused from regulation but I certainly would insist that the rules of the Commission be greatly simplified insofar as they are concerned and that ample time be given to these small producers to orderly comply with the Commission's regulations. I would give serious consideration to a grandfather clause qualification for these producers. I personally know that very few, if any, of the independent producers will have any understanding of their duties after reading the Order by the majority of

the Commission. I also know it will be almost impossible for them to secure the services of attorneys who are in a position to tell them what to do without first making a thorough study and research concerning the Commission's rules and regulations which are very voluminous and greatly in need of revision and compiling.

Under the majority opinion, no producer's price can be increased after June 7, 1954, without a proceeding before the Commission. Our records here disclose that some transmission companies are purchasing gas from producers under firm contracts which contain provisions of one kind or another for the increase in the price of gas which has become effective or will become effective after June 7, 1954, and before any opportunity can be afforded for the Commission to consider a producer's application to increase his rate to the transmission company. For instance, the Texas State Producing Tax becomes effective, according to my information, on September 1, 1954. Most purchase contracts of transmission companies provide for the payment by the purchaser of all or a part of this additional tax. Under the Order, the transmission company will be faced with the problem of paying the additional price and running the risk of never recovering it or refusing to pay it and run the risk of having its gas cut off for the non-payment of the purchase price. Of course, if this should be done, the transmission company would be faced with lawsuits by distributors to whom they are selling under firm contracts. All of these conditions could be properly taken care of by an order approving all existing firm sales contracts made in good faith and at arm's-length up to and including a future date of, say, October

15, 1954. This would give an opportunity to have both the producer and the transmission company before the Commission on the matter of price regulation concurrently and would eliminate many hardships and problems which, in my opinion, are unnecessary. This policy would simply be to continue for the purpose of securing good regulation the same policy which has existed since the adoption of the Natural Gas Act in 1938 and certainly an additional 60 or 90 days under the same rules and regulations which have prevailed in the past would be a small price to pay for an opportunity to approach this greatly enlarged regulation with thought and consideration.

Section 157.23(a) of the Order makes mandatory upon all producers who were selling gas in interstate commerce on June 7, 1954, the obligation to apply to the Federal Power Commission for a certificate of public convenience and necessity to authorize such sale. In this connection, I would like to call attention to the fact that the Natural Gas Act, when passed by Congress, provided for a period within which any natural-gas company, as defined by the Act, could withdraw from its activities, or, in the absence of such withdrawal, should apply for a certificate of public convenience and necessity. Also, Rule 1.7(c) of the Commission's regulations provides for a declaratory proceeding for the determination of the question of jurisdiction. This Order not only refuses an opportunity to the producer to withdraw from any transaction which makes him a natural-gas company but makes the Order retroactive to June 7, 1954, and, in my opinion, is in violation of the purpose and intention of Congress in adopting the Natural Gas Act. I further feel that section 7(b) of the Natural Gas Act,

dealing with abandonment, may be subject to the interpretation that the abandonment which cannot be made without first obtaining a certificate therefor is the abandonment of facilities which have been certificated or the abandonment of services through *such* facilities. It is certainly indisputable that the provisions of this section of the Natural Gas Act and its treatment in Section 157.24 of the Order adopted by the majority of the Commission is subject to great doubt and deserves a determination after the interested parties have been given a chance to be heard. Section 157.24 of the Commission's Order makes a determination of this legal issue retroactively and without giving an opportunity to the interested parties to be heard on the subject. There is a strong possibility that this Order violates the due process clause of the Fourteenth Amendment of the Constitution, as well as the contract clause of Section 10, Article 1, of the Constitution.

It is my considered opinion that the majority of the Commission has permitted good intentions and plausible purposes with reference to immediate and positive action to lead them into error.

.....

S. L. Digby, Commissioner

Filed: July 15, 1954

Issued: July 16, 1954

Order 174-A of Federal Power Commission, August 6 1954

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuyendall, Chairman; Claude L. Draper and Seaborn L. Digby.

In the Matter of	
Compliance by natural-gas producers and gatherers with certificate and rate requirements	Docket No. R-138

ORDER NO. 174-A (SUPERSEDING ORDER NO. 174)

ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

By Order No. 174 issued July 16, 1954 (19 F. R. 4534) the Commission amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for

certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company* v. *Wisconsin et al.*, 347 U. S. 672.

Upon further consideration of the matter, the Commission, *finds:*

(1) Sections 157.23, 157.24 and 157.25 of the Regulations under the Natural Gas Act prescribed by Order No. 174 should be revised, as hereinafter provided, so as to allow those proposing to engage in the transportation or sale of natural gas in interstate commerce as independent producers to use one of the simpler forms of application therein provided and to clarify some of the requirements of those forms, and to clarify Section 154.94. Section 154.102, *Posting,* should be eliminated and Section 154.103, *Applicability,* should be re-numbered as Section 154.102.

(2) The other sections in Parts 154 and 157 of the Regulations under the Natural Gas Act prescribed by Order No. 174 which are not being revised or eliminated should be readopted and as so readopted, together with the revised Sections 157.23, 157.24 and 157.25, are necessary and appropriate to carry out the provisions of the Natural Gas Act.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U. S. C. 717c, 717f

and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. 1002, 1003), *orders:*

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.*—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effec-

tive on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

Order 174-A of Federal Power Commission, August 6 1954

§ 154.93 *Rate Schedule Defined*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be

filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change

is suspended, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers,

State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.95 *Oral Agreements*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission.

§ 154.96 *Filing Date*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

§ 154.97 *Cancellation or Termination*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

Order 174-A of Federal Power Commission, August 6 1954

§ 154.98 *Waiver of Notice Requirements*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 *Number of Copies*—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing*—The Commission reserves the right to reject any rate schedule or material submitted for filing which

fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101 *Acceptance for Filing not Approval*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Applicability of Sections 154.91 through 154.101*—Sections 154.91 through 154.101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer*—(a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commis-

sion a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will

amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. In those instances where a certificate of public convenience and necessity is required of a natural-gas company for the construction or operation of facilities to enable it to take natural gas from another natural-gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously.

§ 157.24 *Contents of application.* (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of

natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Notice of the application shall be given by applicant by service of a true copy of the application (without the exhibits provided for in § 157.25) upon the State regulatory commission, agency, or official having authority to regulate the transportation or sale of gas in every State in which applicant operated on June 7, 1954 or proposes to operate, or

upon the Governor of the State when there is no such State regulatory commission, agency, or official, by delivery of said copy in person or by registered mail.

§ 157.25 *Necessary exhibits*—There shall be filed with the application as a part thereof the following exhibits. Any information required which is already on file with the Commission may be incorporated by reference. If the application covers operations on June 7, 1954, and the applicant is unable to file any designated exhibit on or before October 1, 1954, a statement setting forth the reasons for such failure should be submitted in lieu of the appropriate lettered exhibit and a further extension of time for filing the exhibit, not to exceed 90 days, may be granted. The following required exhibits are designed to amplify paragraphs (a) and (b) of § 157.24.

Exhibit A. If applicant represents a group of individuals, satisfactory proof of his authority to file the application.

Exhibit B. A general key map of applicant's facilities for the production, transportation, or sale of natural gas showing:

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a)(4)(iv).

The map need be only of sufficient scale and in sufficient detail to show the geographical location of the properties.

Exhibit C. The applicant may submit as many additional exhibits as may be deemed essential for consideration of the application.

§ 157.26 *Form of filing*—An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application

(which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other information*—The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service*—No independent producer as defined in Section 154.91 of these Rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained in accordance with Section 7(b) of the Natural Gas Act.

§ 157.29 *Applicability of Sections 157.23 to 157.28*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in ac-

cordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174 issued July 16, 1954 is hereby rescinded and superseded by this Order.

(F) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

Adopted: July 30, 1954

Issued: August 6, 1954

Order 174-A of Federal Power Commission, August 6 1954

Exhibit A
(Section 157.23)

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BY CLASS B INDEPENDENT PRODUCER[1]
(File original and five copies)

(1) Name of Applicant .....

(2) State of Organization .....

(3) Location of Principal Place of Business .....

(4) Names of States in Which Authorized to do Business .....
.....

(5) Person Responsible for Application:
(a) Name and Title .....
(b) Mailing Address .....

(6) Description of Facilities Used for Operations for Which Certificate is Requested (where applicable).
(a) Pipelines.
(i) Location .....
(ii) Length and diameter .....
(iii) Capacity (Mcf daily) .....
(b) Compressor Stations.
(i) Location .....
(ii) Horsepower .....
(iii) Capacity (Mcf daily) .....
(c) Gasoline Plants.
(i) Location .....
(ii) Capacity (Mcf daily) .....

[1]Independent producers defined in Section 154.91 as transporting in interstate commerce or selling in interstate commerce for resale a total of less than 1,000,000 Mcf per year of natural gas.

(d) Dehydration Plants.
  (i) Location .....
  (ii) Capacity (Mcf daily) .....

(e) Purification Plants.
  (i) Location .....
  (ii) Capacity (daily) .....

(f) Storage Projects.
  (i) Location .....
  (ii) Maximum volumes that can be stored Mcf .....

(7) Gas Supply.

(a) Own Production:
  (i) Name and location of field .....
  (ii) Acreage controlled .....
  (iii) Estimated gas reserve in place .....

(b) Gas Purchased:
  (i) Name of seller .....
  (ii) Name and location of field .....
  (iii) Estimated gas reserve in place .....
  (iv) Point of delivery to applicant .....

(8) Gas Sales or Transportation Contracts (for each contract).[1]

(a) Name of purchaser .....
(b) Point of delivery .....
(c) Contract volumes Mcf (daily or annually), indicating pressure base .....
(d) Price at time of filing .....
(e) Date of contract .....
(f) Term of contract .....
(g) Special conditions (if any) .....

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[1]Contracts on file as rate schedules may be incorporated by reference.

Order 174-A of Federal Power Commission, August 6 1954

In the Matter of	
Compliance by natural-gas producers and gatherers with certificate and rate requirements	Docket No. R-138

DIGBY, Commissioner, *dissenting:*

I find it necessary to restate my dissent from the conclusions by the majority of the Commission in connection with this Order since Order No. 174, carrying my dissent, is completely repealed by this Order. I do, however, approve of the changes which this Order makes from the provisions of Order No. 174.

In approaching our responsibilities in connection with the added jurisdiction of the Federal Power Commission over producers and gatherers of gas as outlined in the recent Supreme Court decision, it should be realized that we are dealing with the seventh largest industry in this country and that millions of consumers may be directly affected by our approach to this matter.

It is my opinion that the majority of the Commission has exceeded its rule-making authority in adopting this *ex parte* and unilateral order. The effect of this order will not only fix rates retroactively to June 7, 1954, but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954. Any retroactive date is arbitrary. There would be as much sanction in law for making these regulations retroactive to the effective date of the Natural Gas

Act in 1938 as any other retroactive date. This, in my opinion, is in violation of the express provisions of the Natural Gas Act which prohibits the fixing of rates retroactively. I also feel that the Order may have the effect of depriving the producers of the provisions of Section 4 of the Natural Gas Act. Under Section 4 of the Natural Gas Act, a natural-gas company may file an increased rate with the Commission, which rate can be suspended by the Commission for a period not to exceed five months after which time the company may collect the increased rate under bond awaiting a final determination by the Commission. In freezing the producer's rate as of June 7, 1954, they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954. Further, original tariffs or rates cannot be suspended by the Commission and the company is entitled under the law to collect the filed rate at least until after an investigation by the Commission with a final determination concerning the rate. In these particulars, at least, it is my opinion that the Order adopted by the majority of the Commission may deprive independent producers, as defined in that Order, of their right of due process of law. The Order adopted by the majority of the Commission requires all independent producers who were selling gas into interstate commerce on June 7, 1954, to file with the Commission their sales contracts as of June 7, 1954. The Order further requires all of these producers to make application to the Commission for certificates of public convenience and necessity authorizing each and every separate sale in interstate commerce. It has been repeatedly stated that there

are 2,300 such independent producers. Most of these producers who are selling gas in interstate commerce will have an average of three separate sales which would require a minimum of 6,000 applications for certificates of public convenience and necessity to be filed with the Federal Power Commission not later than October 1, 1954, and this addition to the filing of all sales contracts under the rate provisions of the Order. From the records on file with this Commission, it appears that about 80% of all the gas being sold in interstate commerce is sold by approximately 61 companies and that the remaining 20% is sold by over 2,000 small producers in twenty States. It seems to me that a more prudent approach to our regulatory responsibility would call for the institution of separate proceedings in connection with the 61 companies selling 80% of the natural gas with the right afforded to these companies of a public hearing under an order dealing with the rights of the parties in a prospective manner and not imposing regulations retroactively. By requiring the immediate filing of rate schedules and applications for certificates of public convenience and necessity authorizing each sale, I fear the Commission will be unable to see the forest for the trees. I do not suggest that the smaller producers be excused from regulation but I certainly would insist that the rules of the Commission be greatly simplified insofar as they are concerned and that ample time be given to these small producers to orderly comply with the Commission's regulations. I would give serious consideration to a grandfather clause qualification for these producers. I personally know that very few, if any, of the independent producers will have any

understanding of their duties after reading the Order by the majority of the Commission. I also know it will be almost impossible for them to secure the services of attorneys who are in a position to tell them what to do without first making a thorough study and research concerning the Commission's rules and regulations which are very voluminous and greatly in need of revision and compiling.

Under the majority opinion, no producer's price can be increased after June 7, 1954, without a proceeding before the Commission. Our records here disclose that some transmission companies are purchasing gas from producers under firm contracts which contain provisions of one kind or another for the increase in the price of gas which has become effective or will become effective after June 7, 1954, and before any opportunity can be afforded for the Commission to consider a producer's application to increase his rate to the transmission company. For instance, the Texas State Producing Tax becomes effective, according to my information, on September 1, 1954. Most purchase contracts of transmission companies provide for the payment by the purchaser of all or a part of this additional tax. Under the Order, the transmission company will be faced with the problem of paying the additional price and running the risk of never recovering it or refusing to pay it and run the risk of having its gas cut off for the non-payment of the purchase price. Of course, if this should be done, the transmission company would be faced with lawsuits by distributors to whom they are selling under firm contracts. All of these conditions could be properly taken care of by an order approving all existing firm sales contracts made

in good faith and at arm's-length up to and including a future date of, say, October 15, 1954. This would give an opportunity to have both the producer and the transmission company before the Commission on the matter of price regulation concurrently and would eliminate many hardships and problems which, in my opinion, are unnecessary. This policy would simply be to continue for the purpose of securing good regulation the same policy which has existed since the adoption of the Natural Gas Act in 1938 and certainly an additional 60 or 90 days under the same rules and regulations which have prevailed in the past would be a small price to pay for an opportunity to approach this greatly enlarged regulation with thought and consideration.

Section 157.23(a) of the Order makes mandatory upon all producers who were selling gas in interstate commerce on June 7, 1954, the obligation to apply to the Federal Power Commission for a certificate of public convenience and necessity to authorize such sale. In this connection, I would like to call attention to the fact that the Natural Gas Act, when passed by Congress, provided for a period within which any natural-gas company, as defined by the Act, could withdraw from its activities, or, in the absence of such withdrawal, should apply for a certificate of public convenience and necessity. Also, Rule 1.7(c) of the Commission's regulations provides for a declaratory proceeding for the determination of the question of jurisdiction. This Order not only refuses an opportunity to the producers to withdraw from any transaction which makes him a natural-gas company but makes the Order retroactive to June 7, 1954, and, in my opinion, is in violation of the purpose and intention of Congress in adopting the Natural Gas

Act. I further feel that Section 7(b) of the Natural Gas Act, dealing with abandonment, may be subject to the interpretation that the abandonment which cannot be made without first obtaining a certificate therefor is the abandonment of facilities which have been certificated or the abandonment of services through *such* facilities. It is certainly indisputable that the provisions of this section of the Natural Gas Act and its treatment in Section 157.24 of the Order adopted by the majority of the Commission is subject to great doubt and deserves a determination after the interested parties have been given a chance to be heard. Section 157.24 of the Commission's Order makes a determination of this legal issue retroactively and without giving an opportunity to the interested parties to be heard on the subject. There is a strong possibility that this Order violates the due process clause of the Fifth Amendment of the Constitution, as well as the contract clause of Section 10, Article 1, of the Constitution.

It is my considered opinion that the majority of the Commission has permitted good intentions and plausible purposes with reference to immediate and positive action to lead them into error.

. . . . . .

S. L. Digby, Commissioner

Filed: July 30, 1954

Issued: August 6, 1954

Order 174-B of Federal Power Commission, December 17 1954

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman, Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matters of	
Compliance by natural-gas producers and gatherers with certificate and rate requirements	Docket No. R-138
and	
Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies	Docket No. R-137

ORDER NO. 174-B

ORDER AMENDING ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, WAIVING ACCOUNTING REQUIREMENTS, AND RELATING TO AUTOMATIC ESCALATION AND FAVORED NATION CLAUSES IN CONTRACTS FOR THE SALE OF NATURAL GAS BY SUCH PRODUCERS AND GATHERERS

Order 174-B of Federal Power Commission, December 17 1954

DOCKET No. R-138

1. By Order No. 174-A (superseding Order No. 174) issued August 6, 1954 (19 F. R. 5081), the Commission amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U. S. 672.

2. Numerous petitions for rehearing were filed and rehearing of Order No. 174-A was granted by order issued September 8, 1954 (19 F. R. 5952) for the purpose of receiving briefs and arguments in order that the Commission might determine whether to revoke, rescind or modify that order in any respect. Briefs and comments were filed and oral argument thereon was had on September 22 and 23, 1954. As a consequence, Order No. 174-A was modified by order issued September 24, 1954 (19 F. R. 6301) by which the filing dates prescribed in that order for some purposes were extended from October 1 to December 1, 1954. At the same time a clarifying change was made in the third paragraph of Section 154.94.

3. Upon consideration of the briefs and arguments made herein together with the experience gained in its

operations to date under the existing provisions of Order No. 174-A, the Commission is of the opinion that it is necessary and desirable in the public interest and for its own convenience that those portions of its General Rule and Regulations embodied in Order No. 174-A be further amended to read as set out below.

4. Many of the petitions for rehearing although objecting to the lack of notice when the rules were originally adopted, recommended changes which would be of a distinctively substantive nature. Substantive rules, however, do not appear desirable in connection with the filings with which these rules are concerned and it is the intention of the Commission to relate these rules strictly to procedural matters. A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the Act by the the decision of the United States Supreme Court in *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U. S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

5. Some of the petitions urged that the regulations be amended to relieve small producers from the requirements of the statute. The Act does not provide for exemptions from its requirements, but the regulations for producers are herein revised in Sections 154.91, 154.92, 154.94 and 157.23 to further simplify the filings by small producers.

6. It was also urged that the Commission limit the applicability of the Act to those operators selling gas in interstate commerce after processing or gathering and acting for other working interests. The rules are here revised by the addition of a paragraph in Section 154.91 under which operators may file in those situations where the purposes of the statute as to certificate requirements and rate fixing may be made fully effective, without calling for separate filings by those having working interests, although such interests may also file if they care to do so. It is expected that by this paragraph a large number of parties having working interests may be relieved of the filing requirements, although, of course, they are not and cannot be exempted from the statute, if, by reason of their activities, they come within its terms.

7. The map required in Section 157.25 as an exhibit in support of a certificate application is not intended to be a topographic survey map but a general sketch. A further exhibit is also required as set forth in paragraph 10 below.

8. The statement in the rules with respect to the abandonment of service has been misconstrued and for that reason is being revised to quote Section 7(b) of the Act. A

proviso is added, however, that nothing in the rules shall be construed as interfering with or intended to interfere with or prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production of natural gas.

9. There has been some confusion as to the notices or copies to be furnished to State commissions and the references thereto in the rules are eliminated. Other minor revisions of a technical or clarifying nature are also made in some of the sections below.

DOCKET No. R-137

10. In Docket No. R-137 the Commission has under consideration the desirability of adopting rules within the terms of the Natural Gas Act either in connection with the issuance of certificates of public convenience and necessity whereby contracts between producers and interstate pipeline companies containing automatic escalation and favored nation clauses would be declared not to be admissible as evidence of gas supply, or in connection with rate-making whereby increased payments made under escalation provisions but having no relation to additional or improved service or gas supplies to an interstate transporter could be disallowed, or in some other connection whereby effective action can be taken in the premises pursuant to the terms of the Act.

11. General public notice of proposed rule-making in Docket No. R-137 was given by publication in the Federal

Register on May 13, 1954 (19 F. R. 2768) and mailing notices to interested parties, including State and Federal regulatory agencies. This notice invited data, views, comments, and suggestions concerning the contract provisions mentioned and set oral arguments thereon for September 9, 1954. By notice similarly published on July 22, 1954 (FR 4543) the date for oral argument was continued to November 4, and the argument was heard on November 4 and 5, 1954.

12. Views, comments and suggestions were filed by numerous persons, including the representatives of State regulatory agencies, companies engaged in local distribution of natural gas, interstate pipe-line companies, and independent producers and gatherers. Representatives of all of these diverse interests took part in the oral argument.

13. As a result of the representations submitted both orally and in writing in Docket No. R-137 and in view of the desirability of clarifying the showing to be made in this connection by natural-gas companies seeking certificates of public convenience and necessity, the contracts of sale are hereinafter required as an exhibit in support of an application under Sections 157.24 and 157.25 for a certificate of public convenience and necessity. Escalation clauses of the type referred to in Section 157.25, *Exhibit B,* below, in the sales contracts of independent producers so submitted should not be considered in support of any application nor given effect by the Commission.

Order 174-B of Federal Power Commission, December 17 1954

Upon further consideration of the matter, the Commission *finds*:

(1) Sections 154.91, 154.92, 154.94, 154.95, 154.97, 154.98, 157.23, 157.24, 157.25 and 157.28 of the Regulations under the Natural Gas Act prescribed by Order No. 174-A, as amended by the order issued September 24, 1954 herein, should be further revised for the reasons and in the manner set forth above.

(2) Adoption and promulgation of the proposed revisions are necessary and appropriate to carry out the provisions of the Natural Gas Act.

(3) For convenience, it is appropriate that those sections of Order No. 174-A which are not revised hereby be published together with the revised sections referred to above and that the order as so revised be designated as Order No. 174-B.

(4) The points and issues raised by the petitions for rehearing which are not covered by the revisions hereinafter made should be denied.

(5) From the circumstances referred to in the recitals above set forth, it appears that good cause exists for immediate issuance of the following regulations and it is unnecessary in the public interest that notice or further public proceedings be had prior to the adoption of such revised Regulations.

(6) Upon full consideration of the representations made in Docket No. R-137; escalation clauses of the

types referred to in Section 157.25, Exhibit B, below are not in the public interest and such clauses will not be considered as evidence in support of any application for a certificate of public convenience and necessity or for other purposes nor given effect by the Commission.

(7) Further proceedings in Docket No. R-137 are not necessary.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U. S. C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. 1002, 1003), orders:

(A) Part 154-Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 Applicability.—(a) An "independent producer" as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

(b) The filings with regard to all sales required under § 154.92, § 154.94 and § 157.23 may be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an operator under this paragraph, the parties to the operating arrangement, and those producers who sell to the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operating arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any

changes in the several respects since the list was previously submitted.

§ 154.92 *Filing of Rate Schedules by Independent Producer.*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or

sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county, and State) at which delivery is made.

§ 154.93 *Rate Schedule Defined.*—For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and

regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules.*—(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92

shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedules providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the follow-

ing information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 month immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the foregoing paragraphs in this Section, file a statement showing (1) the approximate annual volume involved; (2) the rate

charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

§ 154.95 *Oral Agreements.*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in duplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in duplicate, their understanding of the agreement.

§ 154.96 *Filing Date.*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.92 through 154.99 of these Regulations.

§ 154.97 *Cancellation or Termination.*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30

days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements.*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 90 days before the effective date.

§ 154.99 *Number of Copies.*—Two copies of any rate schedule or part thereof, and material required by Section 154.95 to be filed therewith, and Notices of Cancellation or Termination submitted for filing, must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the

Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing.*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.92 through 154.99.

§ 154.101 *Acceptance for Filing not Approval.*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Applicability of Sections 154.92 through 154.101.*—Sections 154.92 through 154.101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is

amended by adding thereto new sections reading as follows:

§ 157.23 *Applications for Certificates of Public Convenience and Necessity by Independent Producer.*—(a) Every independent producer of natural gas as that term is defined in Section 154.91 who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before December 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by December 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these

rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the commission to consider all related matters concurrently.

(c) Filings hereunder may be made by an operator as provided in § 154.91 hereof.

§ 157.24 *Contents of applications.*—(a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Com-

mission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the name of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale

on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i. e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more

per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

§ 157.25 *Necessary exhibits.*—There shall be filed with the application as a part thereof the following exhibits:

Exhibit A. Map. Each applicant under Section 157.24 shall file as a part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A. The map need be only of sufficient scale and in sufficient detail to show

the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe-line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, 1-2, etc., as indicated as § 157.24 (a)(4)(iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transpor-

tation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); and provided further, That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. Escalation clauses in contracts submitted hereunder on or after May 1, 1955 will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

§ 157.26 *Form of filing.*—An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other information.*—The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service.* — No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

§ 157.29 *Applicability of Sections 157.23 to 157.28.*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The amendments of rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174-A issued August 6, 1954 is hereby revised and as revised herein shall be designated as Order No. 174-B.

(F) The petitions for rehearing filed herein are denied with respect to all other points and issues raised in such petitions.

(G) The proceedings in Docket No. R-137 are hereby terminated.

(H) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner Digby dissenting.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

[Seal—Federal Power Commission, U. S. A.]

Adopted: December 16, 1954

Issued: December 17, 1954

Order 174-B of Federal Power Commission, December 17 1954

Exhibit A
(Section 157.23)

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BY CLASS B INDEPENDENT PRODUCER[1]
(File original and five copies)

(1) Name of Applicant .....

(2) State of Organization .....

(3) Location of Principal Place of Business .....

(4) Names of States in Which Authorized to do Business .....
.....

(5) Person Responsible for Application.

(a) Name and Title .....
(b) Mailing Address .....

(6) Description of Facilities Used for Operations for Which Certificate is Requested (where applicable).

(a) Pipelines.
(i) Location .....
(ii) Length and diameter .....
(iii) Capacity (Mcf daily) .....

(b) Compressor Stations.
(i) Location .....
(ii) Horsepower .....
(iii) Capacity (Mcf daily) .....

(c) Gasoline Plants.
(i) Location .....
(ii) Capacity (Mcf daily) .....

(d) Dehydration Plants.
(i) Location .....
(ii) Capacity (Mcf daily) .....

(e) Purification Plants.
  (i) Location .....
  (ii) Capacity (daily) .....

(f) Storage Projects.
  (i) Location .....
  (ii) Maximum volumes that can be stored Mcf .....

(7) Gas Supply.

(a) Own Production:
  (i) Name and location of field .....
  (ii) Acreage controlled .....

(b) Gas Purchased:
  (i) Name of seller .....
  (ii) Name and location of field .....
  (iii) Point of delivery to applicant .....

(8) Gas Sales or Transportation Contracts (for each contract).[2]

(a) Name of purchaser .....
(b) Point of delivery .....
(c) Contract volumes Mcf (daily or annually), indicating pressure base .....
(d) Price at time of filing .....
(e) Date of contract .....
(f) Term of contract .....
(g) Special conditions (if any) .....

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[1]Independent producers defined in section 154.91 as transporting in interstate commerce or selling in interstate commerce for resale a total of less than 1,000,000 Mcf per year of natural gas.

[2]Contracts on file as rate schedules may be incorporated by reference.

Order 174-B of Federal Power Commission, December 17 1954

In the Matters of	
Compliance by natural-gas producers and producers and gatherers with certificate and rate requirements	Docket No. R-138
and	
Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies	Docket No. R-137

DIGBY, Commissioner, *dissenting*:

Without restating my dissent from Order No. 174-A, I wish to adopt it by reference.

Agreeable to information submitted and experience gained since the issuance of Order No. 174-A, I dissent from this amendment of that order.

First: I believe that it is the Commission's responsibility and duty to define its jurisdiction over independent producers and gatherers of natural gas. Without such a decision by the Commission, hundreds of independent producers will file applications for certificates of public convenience and necessity, together with rate filings, in transactions entirely outside of the jurisdiction of the Federal Power Commission. By a positive determination at this time by the Commission, orderly regulation would be greatly advanced both with reference to certificate proceedings and rate filings and proceedings. In this connection, I would

have the Commission give a broad but limiting definition of sales of natural gas by independent producers, gatherers, and processors of natural gas subject to regulation under the Natural Gas Act. The only provision in the Natural Gas Act as interpreted by the court decisions thereon concerning jurisdiction over producers and gatherers of gas is a reference to a "sale in interstate commerce of natural gas for resale." When the sale is made to a person who gathers gas and processes it in the state where it is produced and then the residue is sold in interstate commerce for resale, the first transaction, in my opinion, is purely a local one and not a sale in interstate commerce of natural gas for resale. This conclusion is certainly supported by the provisions of the Natural Gas Act. Section 1(b) applies "to the sale in interstate commerce . . . for resale" but "shall not apply to any other . . . sale." The Act does not, and the court opinions do not, imply that it applies to the sale for resale in interstate commerce but only "to the sale in interstate commerce for resale." It is my opinion that this order should define a jurisdictional sale of natural gas under the Natural Gas Act as a *direct* sale of natural gas in interstate commerce for resale, which sale of natural gas shall include all natural gas dedicated by contract for sale in interstate commerce for resale. In agreement with the language of the Act, I would prescribe that no other sales of natural gas are subject to the jurisdiction of the Federal Power Commission. In the Supreme Court decision in the Phillips case, the Court stated that Phillips admitted that it engaged in "the sale in interstate commerce . . . for resale." Therefore, the question of the sale in interstate commerce for resale was not an issue. The Court went to great

lengths in detailing the facts concerning the wholesale sale by Phillips at the tailgate of its processing plant after production, gathering, and processing of the gas. It has been argued with much force that a well-head sale of natural gas, even though it be a *direct* sale in interstate commerce for resale, is not subject to regulation for the reason it is neither a wholesale sale nor a sale in interstate commerce for resale after production and gathering have intervened. At the outset, in discussing this point, I expressed a view in favor of a broad but limiting definition of sales subject to regulation. I consider the definition which I have used to be broad and perhaps inclusive of some sales such as well-head sales which may be determined by the courts to be non-jurisdictional.

Second: It is my opinion that all fixed escalations or different prices of gas denominated in mills or cents contained in good faith arm's-length contracts in existence on the effective date of Order No. 174-A should be accepted as a part of the original rate and constituting one tariff or rate schedule not subject to suspension under Section 4 of the Natural Gas Act. These contracts were entered into at a time when the contracting parties had no thought of regulation of the price under the authority of the Natural Gas Act. Most of the contracts were entered into for long terms and supported by a dedication of gas reserves in compliance with requirements of the Federal Power Commission in certificate proceedings by transmission companies. Order No. 174-A requires that all of these contracts be filed as rate schedules. Under the provisions of the Natural Gas Act and in rate regulation in general the filer of an original

rate schedule has a legal right to file an original rate of his own choosing, subject of course to investigation upon complaint by an interested party or at the instance of the Federal Power Commission but not subject to suspension under Section 4 of the Natural Gas Act. The financial feasibility of transmission lines and distribution systems were predicated upon the over-all price conditions contained in these contracts. Securities issued and sold upon this understanding of the transaction are held by thousands of people who will be directly affected by our treatment of this subject. Accepting these original rate schedules including periodic changes in the price of gas would not be an approval of the rate as fair and reasonable but would simply treat the changes as component parts of an original rate schedule not subject to suspension.

.....

Seaborn L. Digby, Commissioner

Filed: December 16, 1954

Issued: December 17, 1954

Order 174-B of Federal Power Commission, December 17 1954

In the Matters of	
Compliance by natural-gas producers and producers and gatherers with certificate and rate requirements	Docket No. R-138
and	
Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies	Docket No. R-137

SMITH and STUECK, Commissioners, *concurring:*

While concurring—under the circumstances here present—in the action of the Commission, we find ourselves in agreement with so much of what is said in the dissenting opinion that it seems appropriate to state with some particularity our position regarding the two major points covered therein.

We share fully the view that it would be highly desirable, if it were now possible, for the Commission to resolve prevailing uncertainties concerning the sweep of its jurisdiction under the *Phillips* decision, both to provide proper guidance to the industry affected and to minimize its own administrative burdens and dilemmas.

Depending upon whether prime emphasis is attached to the precise facts presented in the case of Phillips or to the broad language used in the *dictum* of the Supreme Court's opinion, arguments can be made for either of the

extremes of possible interpretations of that decision: that our jurisdiction is limited to the sale of natural gas at the tailgate of the processing plant, or the point where the natural gas enters the interstate pipe line, or, in the alternative, that our jurisdiction extends to every well-head sale in the field, or to the point of the first sale of natural gas for resale, wherever that may be, if interstate commerce turns out ultimately to be involved. Both interpretations have their advocates; both have been urged upon us.

Perhaps the correct answer lies in some as yet undetermined middle ground which would be conducive both to the reasonable and necessary flexibility and the continued good health of a vital industry and to the avoidance of a bogging down under its own weight of the whole regulatory process in the natural-gas field. It seems to us that it is the clear duty and responsibility of this Commission to take the initiative in seeking such a solution. So long as present uncertainties exist and unresolved questions accumulate, a situation which has been described as one of "administrative chaos" seems likely to exist.

Whether, however, we can now properly and wisely determine the precise boundaries of our jurisdiction in the areas of production and gathering is another matter. The question appears to have its substantive aspects, which might require further and more specific notice than that provided in this proceeding,—notwithstanding the fact that some of those who argued on rehearing went rather fully into this phase of the matter. Apart from that, certain of these issues are sharply posed in several proceedings now in hearing before us which, it is to be hoped, may well

add to our understanding of the practical aspects and ramifications of these complex matters. It is for these reasons that we join in the Commission's deferral of a more direct and satisfactory answer—through administrative definitions and rules of general application, which we think should be promulgated when it is feasible to do so—to this very important question at the present time.

Similarly, we are impressed by the strong arguments which have been made for the proposition that existing contracts under which sales of natural gas were being made by producers and gatherers to interstate pipe lines on June 7, 1954, and which the Commission's Order No. 174-A, as modified on September 24, 1954, has required to be filed by December 1, 1954, are to be regarded as complete entities, so that all of their terms—and not just certain selected segments—should be treated as initial rates. Failure to so treat them in effect, it seems to us, in many instances—particularly where stated price adjustments, upward or downward, are provided for on a definite and strictly adhered to periodic basis—might involve grave injustice and disregard some very elementary, obvious and important economic facts of life.

This, however, is not to say that we are compelled, as a matter of law, to so regard these filings, and therefore to disclaim all authority to suspend and, after notice, to examine into the reasonableness, from every point of view, of changes in the charges provided for under such contracts before they may become fully effective. It does seem to us that such provisions contained in pre-existing arm's-length contracts are entitled to great weight and, as initial filings,

may fairly be considered as *prima facie* reasonable. Indeed, many, if not most, of them have been fully disclosed to all interested parties and relied upon in certificate proceedings where new pipe-line projects or extensions or enlargements of existing systems have been approved after being strongly supported by all concerned.

These are factors which, in our judgment, should be taken into account by the Commission and may well be controlling when, in the exercise of its administrative discretion under Section 4 (e) of the Natural Gas Act, it is considering whether or not to suspend rate changes. But we are not now persuaded that in all such situations the Commission is, as a matter of law, confined to investigations pursuant to Section 5 of the Act,—which avenue of approach is, of course, always open to us in any situation wherein the reasonableness of rates subject to our jurisdiction is at issue.

Here again, however, it seems to us probable that the Commission will gain further information and knowledge regarding the impacts and significance of this facet of the problem during the course of the proceedings in Docket No. R-142, which are now scheduled to open on January 11, 1955. Therefore we deem it wise to defer action on this aspect of the matter for the present.

As indicated above, it is our understanding that, as to both of the points so ably developed in the dissenting opinion, the Commission is by its action at this time in no manner or degree foreclosing further consideration, and in no way precluding the future disposition, of these issues through the promulgation of interpretative rules of gen-

eral application in appropriate proceedings, should the feasibility of such a course subsequently appear to be greater than it now does. On the contrary, the earlier supersession of Order No. 174 by Order No. 174-A, and the latter's amendment by the instant Order No. 174-B demonstrate, we believe, the Commission's willingness to follow a properly pragmatic approach to the problems entailed in its newly defined jurisdiction in the areas of production and gathering. We confidently expect, therefore, that further clarifications and refinements of a practical nature will be possible as we gain additional experience and understanding in these new fields of regulation.

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Nelson Lee Smith, Commissioner

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Frederick Stueck, Commissioner

Filed: December 16, 1954

Issued: December 17, 1954

Administrative Procedure Act, 60 Stat. 327, §§ 4 and 10

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general

statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

• • •

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including

actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date

of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * *

ıtural Gas Act of 1938, 52 Stat. 821, 56 Stat. 83, §§ 1, 2, 4, 7, 16, 21 and 22

* * *

ıCESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

Declaration of policy

SECTION 1. (a) As disclosed in reports of the Federal ıade Commission made pursuant to Senate Resolution 83 ieventieth Congress, first session) and other reports made ırsuant to the authority of Congress, it is hereby declared at the business of transporting and selling natural gas r ultimate distribution to the public is affected with a blic interest, and that Federal regulation in matters reing to the transportation of natural gas and the sale ereof in interstate and foreign commerce is necessary the public interest.

Act applies to transportation and sale for resale of natural gas in interstate commerce.

(b) The provisions of this act shall apply to the transrtation of natural gas in interstate commerce, to the le in interstate commerce of natural gas for resale for imate public consumption for domestic, commercial, instrial, or any other use, and to natural-gas companies gaged in such transportation or sale, but shall not apply ier transportation or sale of natural gas or to the local tribution of natural gas or to the facilities used for such tribution or to the production or gathering of natural s. [52 Stat. 821 (1938); 15 U. S. C. § 717 (1946)]

Not to apply to other transportation or sale or to the local distribution or facilities or gathering of natural gas.

Meaning of terms as used.

SEC. 2. When used in this act, unless the context otherse requires—

"Person."

(1) "Person" includes an individual or a corporation.

"Corporation."

(2) "Corporation" includes any corporation, joint-stock mpany, partnership, association, business trust, organized

group of persons, whether incorporated or not, receive
receivers, trustee or trustees of any of the foregoing,
shall not include municipalities as hereinafter defined.

"Municipality." (3) "Municipality" means a city, county, or other
litical subdivision or agency of a State.

"State." (4) "State" means a State admitted to the Union,
District of Columbia, and any organized Territory of
United States.

"Natural gas." (5) "Natural gas" means either natural gas unmi
or any mixture of natural and artificial gas.

"Natural-gas company." (6) "Natural-gas company" means a person enga
in the transportation of natural gas in interstate comm
or the sale in interstate commerce of such gas for res

"Interstate commerce." (7) "Interstate commerce" means commerce betw
any point in a State and any point outside thereof, or
tween points within the same State but through any
outside thereof, but only insofar as such commerce t
place within the United States.

"State commission." (8) "State commission" means the regulatory bod
the State or municipality having jurisdiction to regu
rates and charges for the sale of natural gas to consu
within the State or municipality.

"Commission" and "Commissioner." (9) "Commission" and "Commissioner" means
Federal Power Commission, and a member thereof, re
tively. [52 Stat. 821 (1938); 15 U. S. C. § 717a (19

* * *

COPY BOUN

Natural Gas Act of 1938, 52 Stat. 821, 56 Stat. 83, §§ 1, 2, 4, 7, 16, 21 and 22

ATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

Rates and charges for transportation or sale to be just and reasonable.

SEC. 4. (a) All rates and charges made, demanded, or ceived by any natural-gas company for or in connection ith the transportation or sale of natural gas subject to the risdiction of the Commission, and all rules and regulations fecting or pertaining to such rates or charges, shall be st and reasonable, and any such rate or charge that is t just and reasonable is hereby declared to be unlawful.

Unreasonable rates and charges are unlawful.

(b) No natural-gas company shall, with respect to any nsportation or sale of natural gas subject to the juris- tion of the Commission, (1) make or grant any undue eference or advantage to any person or subject any rson to any undue prejudice or disadvantage, or (2) aintain any unreasonable difference in rates, charges, rvice, facilities, or in any other respect, either as be- een localities or as between classes of service.

Undue preference or advantage prohibited.

Unreasonable differences in rates, etc., or in localities or classes of service forbidden.

(c) Under such rules and regulations as the Commis- n may prescribe, every natural-gas company shall file th the Commission, within such time (not less than sixty ys from the date this act takes effect) and in such form the Commission may designate, and shall keep open in nvenient form and place for public inspection, schedules owing all rates and charges for any transportation or le subject to the jurisdiction of the Commission, and the assifications, practices, and regulations affecting such tes and charges, together with all contracts which in any nner affect or relate to such rates, charges, classifica- ns, and services.

Filing and posting of rate schedules subject to rules and regulations of Commission.

Public to have access to rate schedules.

D CLOSE IN CENTER

Thirty days' notice of change in rates required.

(d) Unless the Commission otherwise orders, [no] change shall be made by any natural-gas company in [any] such rate, charge, classification, or service, or in any [rule] regulations, or contract relating thereto, except after thir[ty] days' notice to the Commission and to the public. [Such] notice shall be given by filing with the Commission [and] keeping open for public inspection new schedules stat[ing] plainly the change or changes to be made in the sched[ules] or schedules then in force and the time when the change [or] changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without [re]quiring the thirty days' notice herein provided for by [an] order specifying the changes so to be made and the time when they shall take effect and the manner in which [they] shall be filed and published.

Posting; filing rate changes.

Relief by Commission from operation of section.

Investigation of new schedules may be made on complaint or initiative of Commission.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of a State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so order[s] without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivery to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That

Hearing.

Suspension pending decision.

Suspension period not to exceed 5 months.

nission shall not have authority to suspend the rate, ge, classification, or service for the sale of natural gas esale for industrial use only; and after full hearings, r completed before or after the rate, charge, classifi-n, or service goes into effect, the Commission may make orders with reference thereto as would be proper in a eding initiated after it had become effective. If the eding has not been concluded and an order made at xpiration of the suspension period, on motion of the ral-gas company making the filing, the proposed ge of rate, charge, classification, or service shall go effect. Where increased rates or charges are thus effective, the Commission may, by order, require the ral-gas company to furnish a bond, to be approved by Commission, to refund any amounts ordered by the mission, to keep accurate accounts in detail of all nts received by reason of such increase, specifying by n and in whose behalf such amounts were paid, and, completion of the hearing and decision, to order such ral-gas company to refund, with interest, the portion ch increased rates or charges by its decision found not fied. At any hearing involving a rate or charge sought e increased, the burden of proof to show that the in-sed rate or charge is just and reasonable shall be upon natural-gas company, and the Commission shall give to hearing and decision of such questions preference over r questions pending before it and decide the same as dily as possible. [52 Stat. 822 (1938); 15 U. S. C. : (1946)]

Rate, etc., for sale for resale for industrial use only cannot be suspended.

On expiration of suspension period change, on motion, shall go into effect.

If rates are increased, bond for refund may be required.

Accurate accounts of increased rate collections.

Refund of increased amount.

Burden of proof as to reasonableness of increased rate on company.

Preference.

* * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVIC

Commission may direct extension or improvement of transportation facilities and establishment of physical connections.

SEC. 7. (a) Whenever the Commission, after noti and opportunity for hearing, finds such action necessa or desirable in the public interest, it may by order direct natural-gas company to extend or improve its transpo tation facilities, to establish physical connection of i transportation facilities with the facilities of, and s natural gas to, any person or municipality engaged or legal authorized to engage in the local distribution of natural artificial gas to the public, and for such purpose to exte its transportation facilities to communities immediate adjacent to such facilities or to territory served by su natural-gas company, if the Commission finds that no u due burden will be placed upon such natural-gas compa thereby: *Provided,* That the Commission shall have authority to compel the enlargement of transportation faci ties for such purposes, or to compel such natural-gas co pany to establish physical connection or sell natural g when to do so would impair its ability to render adequa service to its customers. [52 Stat. 824 (1938); 15 U. S. 717f (a) (1946)]

Commission has no authority to compel enlargement of facilities, etc., if ability of company to render adequate service is impaired.

No abandonment of facilities or service without approval of Commission.

(b) No natural-gas company shall abandon all or a portion of its facilities subject to the jurisdiction of t Commission, or any service rendered by means of su facilities, without the permission and approval of the Co mission first had and obtained, after due hearing, and finding by the Commission that the available supply natural gas is depleted to the extent that the continua of service is unwaranted, or that the present or fut

ic convenience or necessity permit such abandonment. Stat. 824 (1938); 15 U. S. C. 717f (b) (1946)]

Certificate of public convenience and necessity required for construction or extension of facilities.

(c) No natural-gas company or person which will be a ral-gas company upon completion of any proposed con- ction or extension shall engage in the transportation ale of natural gas, subject to the jurisdiction of the mission, or undertake the construction or extension ny facilities therefor, or acquire or operate any such lities or extensions thereof, unless there is in force with ect to such natural-gas company a certificate of public venience and necessity issued by the Commission author- g such acts or operations: *Provided, however,* That if such natural-gas company or predecessor in interest bona fide engaged in transportation or sale of natural , subject to the jurisdiction of the Commission, on the ective date of this amendatory Act, over the route or tes or within the area for which application is made and so operated since that time, the Commission shall issue h certificate without requiring further proof that public nvenience and necessity will be served by such operation, d without further proceedings, if application for such cer- icate is made to the Commission within ninety days after effective date of this amendatory Act. Pending the termination of any such application, the continuance of h operation shall be lawful.

Grandfather clause certificates.

In all other cases the Commission shall set the matter r hearing and shall give such reasonable notice of the aring thereon to all interested persons as in its judg- nt may be necessary under rules and regulations to be scribed by the Commission; and the application shall

Procedure upon application for non-grandfather clause certificates.

be decided in accordance with the procedure provide
subsection (e) of this section and such certificate sha
issued or denied accordingly: *Provided, however,* Tha

Temporary certificates.

Commission may issue a temporary certificate in cas
emergency, to assure maintenance of adequate servic
to serve particular customers, without notice or hea
pending the determination of an application for a certi

Exemption by regulation.

and may by regulation exempt from the requirement
this section temporary acts or operations for which
issuance of a certificate will not be required in the p
interest. [52 Stat. 825 (1938), as amended, 56 Sta
(1942); 15 U. S. C. § 717f (c) (1946)].

Application for certificate; form and content.

(d) Application for certificates shall be made in
ing to the Commission, be verified under oath, and
be in such form, contain such information, and
thereof shall be served upon such interested parties
in such manner as the Commission shall, by regulatio
quire. [56 Stat. 84 (1942); 15 U. S. C. §717f (d) (19

Requirements for issuance of certificate.

(e) Except in the cases governed by the provisos
tained in subsection (c) of this section, a certificate
be issued to any qualified applicant therefor, author
the whole or any part of the operation, sale, service,
struction, extension, or acquisition covered by the
cation, if it is found that the applicant is able and w
properly to do the acts and to perform the service pro
and to conform to the provisions of the Act and the re
ments, rules, and regulations of the Commission there
and that the proposed service, sale, operation, constru
extension, or acquisition, to the extent authorized b
certificate, is or will be required by the present or f

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ic convenience and necessity; otherwise such applica- shall be denied. The Commission shall have the power nch to the issuance of the certificate and to the exer- of the rights granted thereunder such reasonable terms conditions as the public convenience and necessity may ire. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e) 6)].

Commission may attach terms and conditions to issuance of certificate.

(f) The Commission, after a hearing had upon its own on or upon application, may determine the service area ich each authorization under this section is to be lim- Within such service area as determined by the Com- on a natural-gas company may enlarge or extend its ies for the purpose of supplying increased market nds in such service area without further authorization. Stat. 84 (1942); 15 U. S. C. § 717f (f) (1946)]

Commission may determine service areas.

(g) Nothing contained in this section shall be con- d as a limitation upon the power of the Commission nt certificates of public convenience and necessity for e of an area already being served by another natural- mpany. [56 Stat. 84 (1942); 15 U. S. C. § 717f (g) 6)]

Commission may issue certificate for service of area already being served.

(h) When any holder of a certificate of public con- nce and necessity cannot acquire by contract, or is le to agree with the owner of property to the compen- n to be paid for, the necessary right-of-way to con- t, operate, and maintain a pipe line or pipe lines for transportation of natural gas, and the necessary land her property, in addition to right-of-way, for the loca- of compressor stations, pressure apparatus, or other ns or equipment necessary to the proper operation of

Certificate holder may acquire right-of-way for pipe line by eminent domain proceedings in U. S. District Court.

such pipe line or pipe lines, it may acquire the same by exercise of the right of eminent domain in the district c of the United States for the district in which such proj may be located, or in the State courts. The practice procedure in any action or proceeding for that purpos the district court of the United States shall conform nearly as may be with the practice and procedure in sim action or proceeding in the courts of the State where property is situated: *Provided,* That the United St district courts shall only have jurisdiction of cases whe amount claimed by the owner of the property to be demned exceeds $3,000. [61 Stat. 459 (1947); 15 U. § 717f (h) (Supp. V, 1952)]

Practice and procedure shall conform to that of State where property situated.

* * *

ADMINISTRATION POWERS OF COMMISSION; RULES, R LATIONS, AND ORDERS

SEC. 16. The Commission shall have power to peri any and all acts, and to prescribe, issue, make, amend, rescind such orders, rules, and regulations as it may necessary or appropriate to carry out the provisions of act. Among other things, such rules and regulations define accounting, technical, and trade terms used in act; and may prescribe the form or forms of all statem declarations, applications, and reports to be filed with Commission, the information which they shall contain, the time within which they shall be filed. Unless a diff date is specified therein, rules and regulations of the C mission shall be effective thirty days after publicati the manner which the Commission shall prescribe. O

General powers of Commission to issue, amend, rescind orders; prescribe rules and regulations, define accounting terms; prescribe forms.

Effective date of rules and regulations, etc.

e Commission shall be effective on the date and in
anner which the Commission shall prescribe. For the
ses of its rules and regulations, the Commission may
ify persons and matters within its jurisdiction and pre-
e different requirements for different classes of per-
or matters. All rules and regulations of the Commis-
shall be filed with its secretary and shall be kept open
nvenient form for public inspection and examination
g reasonable business hours. [52 Stat. 830 (1938);
. S. C. 717o (1946)]

Persons and matters within jurisdiction of Commission may be classified.

Rules and regulations shall be filed with Secretary and open in convenient form for public inspection.

* * *

GENERAL PENALTIES

EC. 21. (a) Any person who willfully and knowingly
or causes or suffers to be done any act, matter, or
g in this act prohibited or declared to be unlawful, or
willfully and knowingly omits or fails to do any act,
er, or thing in this act required to be done, or willfully
knowingly causes or suffers such omission or failure,
, upon conviction thereof, be punished by a fine of not
e than $5,000 or by imprisonment for not more than
years, or both.

Willful violations of act, etc., punishable by fine and imprisonment.

(b) any person who willfully and knowingly violates
rule, regulation, restriction, condition, or order made
mposed by the Commission under authority of this act,
, in addition to any other penalties provided by law, be
ished upon conviction thereof by a fine of not exceed-
$500 for each and every day during which such offense
rs. [52 Stat. 833 (1938); 15 U. S. C. 717t (1946)]

Willful violations of rules, regulations, orders, etc., punishable by fine.

Natural Gas Act of 1938, 52 Stat. 821, 56 Stat. 83, §§ 1, 2, 4, 7, 16, 21 and 22

JURISDICTION OF OFFENSES; ENFORCEMENT OF LIABILITIES AND DUTIES

District Courts have exclusive jurisdiction of violations of act or of rules, regulations, and orders.

SEC. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder.

Venue in criminal proceedings.

Venue in civil cases.

Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found.

Judgments, decrees subject to review as provided by Judicial Code.

Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347).

Costs cannot be assessed against Commission.

No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U. S. C. 717u (1946)]

* * *

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QUESTION PRESENTED

Whether a District Court had jurisdiction to determine whether an independent producer of natural gas was subject to regulation by the Federal Power Commission under the Natural Gas Act, despite the producer's failure to invoke and exhaust the procedures established by the Federal Power Commission for determining that question.

STATUTES AND ORDERS INVOLVED

The relevant provisions of the Natural Gas Act are set forth in Petitioner's Appendix, pp. 127–138. The orders of the Federal Power Commission here involved are set forth in Petitioner's Appendix, pp. 33–122.

STATEMENT

By its complaint filed in the District Court for the District of Columbia, petitioner seeks to enjoin the Federal Power Commission from enforcing as against it an order establishing a procedure for effectuating this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, that independent producers of natural gas selling in interstate commerce for resale are subject to regulation under the Natural Gas Act. The District Court, on December 1, 1954, granted a preliminary injunction restraining the Commission from enforcing an order against petitioner issued pursuant to the Natural Gas Act, and on

December 31, 1954, denied respondents' motion to dismiss the complaint (R. 26–29, 46). On appeal, the Court of Appeals for the District of Columbia Circuit reversed the District Court, and ordered the action dismissed on the ground that the petitioner had failed to pursue the administrative remedy available to it before the Commission (Pet. App. 21–29).

The order complained of by petitioner, No. 174–A (Pet. App. 60–85), established a procedure for extending the regulatory provisions of the Natural Gas Act to that class of independent producers which this Court held subject to the Act in the *Phillips* decision, *supra*.[1] The Order adopted the language of the *Phillips* decision in defining a class of independent producers subject to the Act as including those natural gas companies "engaged in the production or gathering of natural gas and who transport[s] natural gas in interstate commerce or sell[s] natural gas in interstate commerce for resale * * *" (347 U. S. at 683, 684; Pet. App. 62). The order required producers subject to the Act to file with the Commission,

[1] Order No. 174–A was issued by the Commission in August 1954 and rescinded an earlier Order No. 174 issued in July 1954. The order was issued without notice or hearing because the Commission found that "good cause exists for making the rules and regulations herein adopted effective on less than thirty days notice" in order to minimize the uncertainty and confusion which would result from delay in carrying out this Court's mandate in the *Phillips* proceeding (Pet. App. 35).

by October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service. When a large number of natural gas producers, including petitioner, filed motions for rehearing and a stay of Order No. 174–A, the Commission called for briefs and suggestions as to revision of the Order and granted oral argument on the motions. Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (Pet. App. 87).

In its motion for rehearing petitioner had also requested the Commission to rule that it was not subject to the Natural Gas Act or to Order No. 174–A. On November 19, 1954, before the Commission acted on this motion, petitioner filed its complaint in this action. On December 1, 1954, the District Court enjoined the Commission from enforcing its order against petitioner. Thereafter, on December 17, 1954, the Commission issued Order No. 174–B, a revised and amended version of Order No. 174–A, which emphasized that the order was procedural and non-substantive in nature and that hearings would be held "at the earliest practicable time" to determine the status of each of the various producers, such as petitioner, whose petitions for rehearing had sought determination of their status under the Act (Pet.

App. 87, 88).[2] Subsequently, the District Court, on December 31, 1954, denied respondents' motion to dismiss the complaint for lack of jurisdiction and failure to pursue the administrative remedy. On appeal, the Court of Appeals reversed, and ordered the complaint dismissed for failure to exhaust the administrative remedy (Pet. App. 21–29).

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[2] The order stated (Pet. App. 88):

"We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here [i. e., in the procedural order]".

Order No. 174 also stated (Pet. App. 35):

"Although the decision of the Supreme Court is, of itself, notice to all "independent producers," as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.

"Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth".

ARGUMENT

The Court of Appeals' holding follows the pertinent decisions of this Court, and is in accord with the recent decision of the Tenth Circuit on the same problem in *Amerada Petroleum Corporation* v. *Federal Power Commission,* Nos. 5044, 5046, 5099, 5103, decided March 17, 1956 (reprinted in the Appendix, *infra,* pp. 17–25). There is no conflict and no occasion for consideration by this Court.

1. As a direct result of the Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, holding that the independent producers of natural gas were subject to Federal regulation to the extent that they engaged in "wholesales of natural gas in interstate commerce" (*id.* at 682), the Federal Power Commission was confronted with the urgent problem of devising a procedure, at once fair and expeditious, for bringing an entire segment of the natural gas industry within the regulatory framework of the Natural Gas Act. As a preliminary step in determining which of over 2,000 independent companies[3] were subject to regulation under the Act, and in order to establish a procedure for making the necessary determinations of coverage under the Act, in August 1954 the Commission issued a general procedural order, No. 174–A. On its face, this Order did not

[3] During the fiscal year 1955, 2,141 "independent" natural gas producers filed 10,978 rate schedules with the Commission pursuant to Order No. 174–B. Federal Power Commission 1955 Annual Report, p. 108.

purport to determine which of the over 2,000 independent producers were subject to the Act, a decision which was reserved for subsequent proceedings, but provided only that such producers and gatherers as were subject to the Act should file rate schedules in effect as of June 7, 1954, the date of the *Phillips* decision, and should apply for certificates of convenience and necessity by December 1, 1954. The amended version of the Order adopted on December 17, 1954 (Order No. 174–B) stated that hearings would be held as soon as practicable to determine the status of the various independent companies and, subsequently, a number of independent producers brought proceedings to determine their status under the Act pursuant to Section 1.7 (c) of the Commission's rules, which provides for "a declaratory order to terminate a controversy or remove uncertainty." Plainly, therefore, the Order did not prejudge petitioner's status under the Act, for that question was reserved for future Commission proceedings.

Petitioner, unlike many of the other independent producers, did not seek an authoritative ruling by the Commission as to its status under the Natural Gas Act.[4] It argues that it was entitled to by-pass

[4] It is clear that an order of the Commission determining petitioner's status under the Act would be reviewable by a Court of Appeals pursuant to Section 19 of the Natural Gas Act and by this Court through writ of certiorari. *Phillips Petroleum Corp.* v. *Wisconsin*, 347 U. S. 672. Three such petitions for review of Commission orders in Section 1.7 (c)

the Commission's procedures and try the question of its status under the Act in the District Court, because it would suffer irreparable injury if left to its administrative remedy. However, the prior holdings of this Court make it clear that petitioner was required to pursue the remedy provided by Congress, in spite of its allegations of irreparable injury, and that the Court of Appeals was correct in holding that the District Court could not substitute itself for the agency which Congress had established to make the initial determination of petitioner's status under the Act. *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Lichter* v. *United States*, 334 U. S. 742; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535.[4]

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proceedings, holding independent companies subject to the Act, are now pending before the Fifth Circuit: *Deep South Oil Co.* v. *Federal Power Commission*, No. 15,849; *Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 15,884; *Shell Oil Co.* v. *Federal Power Commission*, No. 15,900.

[4] Petitioner (Pet. 7, 9) argues that these cases did not involve questions of illegality but only of coverage. The allegations of illegality in petitioner's complaint, however, amounted on analysis only to a claim that the Commission's order was illegal as applied to petitioner because petitioner was not subject to the Act. As the Court of Appeals stated, "it seems to us that the real request of the company is to have particular transactions classified as outside the Act and the regulations" (Pet. App. 27).

Every consideration which led this Court to require exhaustion of administrative remedies in earlier cases involving allegations of irreparable injury, such as *Myers* v. *Bethlehem Shipbuilding, supra,* and *Allen* v. *Grand Central Aircraft Co., supra,* is present here, militating against the District Court's premature and disruptive assumption of jurisdiction. The problems facing the Commission following the *Phillips Petroleum* decision were vast in scope and complexity, and the questions involved—including the applicability of the Act to individual companies—were peculiarly within the Commission's competence. A uniform, orderly, and expeditious extension of the Act's coverage was essential to give proper effect to this Court's decision, as well as to avoid injustice and inequity to the companies involved. See *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U. S. 492, 501. The Commission's order requiring the continuation of rates charged by independent producers on June 7, 1954, unless changed in accordance with Section 4 of the Act, and requiring them to provide the information on which an ultimate determination of status could be made, was a necessary preliminary to its undertaking to decide which of the numerous independent producers, including petitioner, were subject to Federal regulations. *Amerada Petroleum Corp.* v. *Federal Power Commission* (C. A. 10, No. 5044, decided March 17, 1956), Appendix, *infra,* pp. 24–25. It follows that the Commission's

procedural Order was a reasonable first step toward effectuating the *Phillips* decision, and that petitioner was required to pursue its remedy before the Commission in order to obtain an initial determination of its status under the Act.

It is true that the Commission's order required petitioner and the other independents to comply with these procedures or risk the penalties consequent on a violation of the Act (if it were ultimately found within the Act), and that petitioner has alleged that it will be injured irreparably unless it obtains an immediate judicial declaration that it is not subject to regulation. However, this Court has repeatedly held that such assertions are insufficient, standing alone, to endow the District Court with jurisdiction to decide a question of coverage which Congress provided should be passed on in the first instance by the administrative agency. *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U. S. 41, 51; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 539, 553.*

* While not here properly at issue, the allegations that petitioner will be irreparably injured, if compelled to pursue the normal route for a determination of its status by the Commission, should be viewed with considerable reservation. Petitioner alleged that it would be injured because the Order would disrupt its outstanding contract relations, and because penalties might be imposed on it if it failed to comply with the Commission's Order. It is probable, first, that petitioner's contract rates adopted prior to June 7,

The normal necessity for exhausting the administrative remedy is strengthened in this case by the fact that Congress, in Section 19 of the Natural Gas Act, provided a special procedure for obtaining review of Commission orders respecting coverage, and "Section 19 (b) reflects the policy that a party must exhaust its administrative remedies before seeking review." *Federal Power Commission* v. *Colorado Interstate Gas Co., supra* at 499. As the Court of Appeals stated (Pet. App. 26–28):

> The statutory scheme in a judicial review of the Federal Power Commission action contemplates an initial decision by the agency, followed by court review. * * * Where means are provided for obtaining administrative determination as to whether the plaintiff companies are subject to rules and regulations of the Commission, those means must be resorted to prior to judicial review. * * *

1954, are not affected by the Commission's Order, even if the contracts provide for escalation after that date. *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (C. A. 10), certiorari denied *sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, No. 684, this Term (April 2, 1956). Second, petitioner can avoid penalties by complying with the procedure established by the Commission to determine its status, and in so doing would not abandon its right to challenge the Commission's conclusion in the Court of Appeals. Moreover, the Commission's Order stated that wherever possible it would avoid the imposition of penalties in view of the general uncertainty as to the Act's coverage (Pet. App. 35).

See also *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 774, 775. In complying with the Commission's procedures, and in contesting the applicability of the Act to its operations before the Commission, petitioner would not waive its right to challenge in the courts the Commission's ultimate conclusion as to its status. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672; *Amerada Petroleum Corp.* v. *Federal Power Commission,* Appendix, *infra,* p. 24.[7]

2. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, relied on by petitioner (Pet. 11), does not point toward review at this stage. As the Court of Appeals notes (Pet. App. 27), that case did not involve a question of coverage, for the Communications Commission regulations were clearly applicable to all radio station licensees, had an immediate adverse effect on the broadcasting company's contractual relations with

[7] There is also a serious question whether petitioner's suit to determine its status under the Natural Gas Act by attacking a procedural regulation, which does not purport to apply directly to it, presented a justiciable controversy before the District Court. It may very well be that, in advance of a finding by the Commission that petitioner was subject to the Act and therefore to the Commission's Order, the District Court lacked jurisdiction to give what would amount in these circumstances to an advisory opinion on petitioner's status under the Natural Gas Act. *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299; *Eccles* v. *Peoples Bank,* 333 U. S. 426; *Public Service Commission* v. *Wycoff Co.,* 344 U. S. 237.

its component stations, and were substantially self-executing. Unlike the instant case, therefore, there was no question of status to be resolved by the agency before resort could be had to the courts. Here, the Power Commission must decide initially whether petitioner is subject to the Act at all. Moreover, the regulations in the *Columbia Broadcasting* case—unlike the present Order—were substantive and not merely procedural in nature, since they outlawed certain provisions in existing contracts between the network and its component stations. There is thus nothing in the *Columbia Broadcasting* ruling contradicting the well established principle that one who complains of agency action must pursue to its conclusion the administrative remedy provided by Congress before resorting to the courts for a determination of his rights. See *Amerada Petroleum Corps.* v. *Federal Power Commission,* Appendix, *infra,* pp. 21–23.

Skinner & Eddy Corp. v. *United States,* 249 U. S. 557, and other cases sanctioning general challenges to *ultra vires* administrative orders, relied on by the petitioner as conflicting with the present Court of Appeals decision (Pet. 7–9), similarly have no application here. In the first place, this Court has already held that the Commission has jurisdiction over the independent producers generally. Moreover, the Order complained of is procedural only, with judicial review

open to petitioner should the Commission subsequently hold it subject to the Act. *Aircraft* v. *Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 767, 771–773. Secondly, *Skinner & Eddy* and the other cases cited did not involve original District Court injunction suits brought, outside of statutory provisions for court review, by persons against whom an administrative order, whether general or particular, had been issued.

3. The weakness of the other bases for District Court jurisdiction advanced by the petitioner can quickly be demonstrated. Petitioner argues that the Commission's Order was defective because it was issued without notice and because it froze the rates of those producers subject to it retroactively to the date of the *Phillips* decision. If, as petitioner contends, it is not subject to the Order, it obviously has no standing to object either to its method of promulgation or its retroactive effect. In any case, the objections are without merit for an appropriate hearing was provided. *Amerada Petroleum Corp.* v. *Federal Power Commission,* Appendix, *infra,* pp. 19–21; Section 4 (a), Administrative Procedure Act, 5 U. S. C. 1003 (a); cf. *American Trucking Associations* v. *United States,* 344 U. S. 298, 318–320.

No greater merit can be assigned the claim that the Commission's Order was necessarily invalid on grounds of retroactivity; the Commission was

confronted with the problem of applying the statute for the first time to an entire segment of the gas industry, and the order did not affect the contract rights of the independent companies prior to the date of the *Phillips* decision recognizing the Commission's jurisdiction over those companies. See Pet. App. 34, 35; *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 134, 135; *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194, 203; and *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 620.

As to petitioner's claim (Pet. 16–19) that the Commission's Order was invalid because it might result at some future time in conflict with state conservation regulations, Order No. 174–B expressly provides that independent companies subject to the Order are not prohibited from obeying state conservation regulations (Pet. App. 110).

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CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1956.

APPENDIX

United States Court of Appeals, Tenth Circuit

Decided March 17, 1956

No. 5044

AMERADA PETROLEUM CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 5046

MIDSTATES OIL CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 5099

CITIES SERVICE OIL COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 5103

SKELLY OIL COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Garrett Logan (Robert J. Stanton, John S. Miller, John A. Woodard, Hawley C. Kerr, Gayle M. Pickens, Hulette F. Aby, Gentry Lee,

C. T. Klein, Watt H. McBrayer, Jr., and R. J. Leithead were with him on the brief) for Petitioners;

Lambert M. McAllister (Willard W. Gatchell and Pascal B. Frazier were with him on the brief) for Respondent.

Before HUXMAN, MURRAH, and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

On June 7, 1954, the Supreme Court rendered its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, holding that the Federal Power Commission had jurisdiction over independent producers which engage in "the sale in interstate commerce of natural gas for resale," and that such a company is a natural gas company as defined in the Natural Gas Act, 15 U. S. C. A. §§ 717–717w. This decision was contrary to the Federal Power Commission's prior interpretation of its own jurisdiction over such activities. Shortly after the *Phillips* decision, on July 16, 1954, the Federal Power Commission issued its order 174.[1] Order 174–A was directed to all "independent producers" as defined and covered by the Natural Gas Act. Among other things it required all independent producers who on or since June 7, 1954, had engaged in the interstate transportation and sale of natural gas subject to the Act to (1) file their contracts in force on June 7, 1954, which in effect became their rate schedules; (2) make no changes in the June 7, 1954, rates except after notice to the Federal

[1] Thereafter the order was changed in minor respects and was superseded by Orders 174–A and 174–B.

Power Commission and subject to its right to suspend such changes; (3) apply to the Commission for certificates of public convenience and necessity covering gas sales made by them; and (4) continue any sales or services rendered until termination was given the express approval of the Federal Power Commission. One commissioner dissented from this order, raising many of the substantive questions asserted by petitioners in this court.

No advance notice was given or hearing held prior to the formulation of Orders 174 and 174–A. Petitioners (Amerada Petroleum Corporation, Midstates Oil Corporation, Cities Service Oil Company and Skelly Oil Company) along with more than one hundred other persons and corporations sought by petition for a "rehearing" to have the Commission set aside the order or change its provisions. The Commission allowed briefs and oral argument in a hearing like that contemplated in Section 4 of the Administrative Procedure Act [2] to be held before the promulgation of general substantive rules and regulations. After that hearing the order was reissued with minor changes, immaterial here, as 174–B. It is from that order petitioners bring the appeals consolidated herein. They assert that the order is appealable, that as independent producers within the definition of the order they have standing to prosecute an appeal; and as grounds for overruling the order they say its formulation violates in several respects the Natural Gas Act, the Ad-

[2] 5 U. S. C. A. § 1005.

vestigated to determine whether it was a natural gas company within the Act was a preliminary finding and was not appealable. Therefore, jurisdiction to consider the appeal cannot be predicated on the Skelly show cause order.

Without even admitting that the Commission has jurisdiction over them and without a finding by the Commission that it has jurisdiction over any of petitioners, petitioners contend that the order violates their substantive rights in several important respects and, therefore, constitutes a final appealable order. They allege that they own and operate gas wells and sell gas under a number of contracts. The opinion is expressed by them that the order may force submission to the jurisdiction of the Federal Power Commission. This position is predicated upon the definition of an independent producer in the order as follows: "An 'independent producer' as that term is defined in §§ 154.91 to 154.202 means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline." Those are almost the exact words of the Supreme Court in defining an independent producer.[3] Without a determination by the Commission whether any of them fall within this definition, and without the aid of a particular application of the definition by the FPC to any given set of facts, we are asked to examine and define the exact extent of the produc-

[3] See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

tion and gathering exemption in the Natural Gas Act as it applies to these petitioners and are in fact asked to determine that they are not subject to the jurisdiction of the Commission.

The case most analogous to the one before us is *United States Gas Pipeline Company* v. *FPC*, 181 F. 2d 796. That case also arose under the Natural Gas Act. It likewise involved a general order. The order was directed to the United Gas Pipeline Company and all other companies similarly situated, requiring them to file rates on a designated basis. The Gas Companies there, as here, contended that the provisions of the order requiring them to file rate schedules worked a retroactive change in rates and was, therefore, reviewable on appeal. The court in a well considered opinion held that the order was general; that it was prospective in nature and of general applicability and not subject to review. That court also considered and distinguished *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, upon which petitioners there, as here, placed strong reliance. We agree with the analysis of the court of the *Columbia Broadcasting Sysem* case distinguishing it upon its facts, and it is our conclusion that the facts in this case likewise distinguish it from that case.

As pointed out, the challenged order is directed to no one. It requires only that all gas companies falling within the definition as laid down make application for a certificate of convenience and file their rate schedules as of June 7. It leaves to each company in the first instance a determination of whether it is under the Act. If petitioners are right in their contention that their activities do not

bring them within the Commission's jurisdiction they need do nothing. The difficulty is that if it is ultimately determined that they are under the jurisdiction of the Commission then their failure to comply with the general order subjects them to severe penalties. But that is a difficulty inherent in the way in which the need for the exercise of the Commission's authority arose. It was necessary for the Commission to make a beginning. For this purpose it promulgated general rules and regulations applying to all subject to the Act. It first defined companies subject to its jurisdiction and required only that such companies file schedules of rates and make applications for certificates of convenience. This is the only practical way the Commission could have made a beginnnig. The only alternative would have been to hold individual hearings with respect to each of innumerable companies to determine upon adduced facts whether they were under its jurisdiction. The impracticability of such a method is obvious.

Neither do we think that the assertion that by the application for a certificate of convenience the applicant submits itself to the jurisdiction of the court is well taken. Such application, of course, can be a qualified one and made so as to reserve to the applicant the right to challenge the jurisdiction of the Commission.

Nor do we think the contention that by fixing the schedule rates as of June 7 as the effective rate constitutes a retroactive fixing of rates or makes a general order substantive in that respect and, therefore, subject to appeal. Again the Commission was faced with the necessity of a beginning rate. It

might well have fixed the rate as of a different time as the beginning rate, and it may even be conceded that the rate as of June 7 might work hardship in a particular case. But that does not make the regulation requiring the filing of such a rate definitive in character, subject to review on appeal. The door is left wide open for a proceeding before the Commission to correct such rate if it is inequitable or unjust. The fact remains that this case comes to us without a record, without a single established fact or finding, and without evidence, and in that posture we as an appellate court are asked to exercise our appellate powers of review. In fact, we are asked to determine that petitioners are not subject to the jurisdiction of the Commission without a single fact upon which to base such determination and in the absence of any findings of fact by the Commission.

Section 10 of the Administrative Procedure Act is pleaded to support our jurisdiction to review the merits of petitioners' claims. It is our view that that Section adds nothing to our authority. It provides for a right of review in a proper court of final agency action where other statutory authority is absent or inadequate, but here Section 19 (b) of the Gas Act provides for a review and we think it is entirely adequate and, therefore, makes inapplicable Section 10 of the Administrative Procedure Act.

It is our conclusion that the petition for review is premature and it is, therefore, DISMISSED.

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APR 27 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 792

UNION PRODUCING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

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STATUTES

Natural Gas Act of 1938, 52 Stat. 821 as amended by 56 Stat. 83, 15 USC §§ 717 *et seq.*

Generally 5

Section 19(b) 2

IN THE

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OCTOBER TERM, 1955

UNION PRODUCING COMPANY, *Petitioner,* *v.* FEDERAL POWER COMMISSION, *et al.*, *Respondents.*	No. 792

REPLY BRIEF FOR PETITIONER

We beg to submit this short reply to the opposing brief of respondents:

1. *Question Presented.* Respondents' statement (br. p. 2) of the "Question Presented" is misleading because it in reality raises no question. It assumes the point to be decided and is not the issue presented in our petition.

2. *Administrative Irresponsibility.* Respondents' treatment of the Tenth Circuit's decision in *Amerada Petroleum Corporation* v. *Federal Power Commission*, decided March 17 1956 (reprinted in their appendix pp. 17 ff.), as being "in accord with" the decision of the District of Columbia Circuit here sought to be reviewed (230 F. 2d 36) is wrong in a significant way. It sharpens the issue so as to enable this Court clearly to see that respondents would create an area of administrative irresponsibility immune from judicial review.

The *Amerada* case decided that the 174 series of orders were *not* subject to review at the hands of an aggrieved

gas producer through the medium of immediate appeal under § 19(b) of the Natural Gas Act, 15 USC § 717r. Petitioner does not dissent from this holding nor seek here to bring it in question. Petitioner's course of action was the wholly independent one of immediate resort to equity by plenary suit. Now this is the remedy which, even under the aggravated circumstances here shown, the court below has held not to be available.

The consequence is that, even though imminently injured by the promulgation of the 174 series of orders with their general impact on contracts and customer relations, petitioner is not entitled to redress at the hands of any court either through § 19(b) (under the *Amerada* rule) or by independent plenary suit (under the rule now announced below). Under these circumstances, for respondents to treat the *Amerada* decision as "in accord with" the holding below, is to say that all access to the courts is cut off. The result achieved, if review through certiorari is not here possible, would be to leave the Federal Power Commission in exercise of a completely arbitrary power to take administrative action injurious to petitioner and others of its class without the possibility of any redress at the hands of the courts. Such cannot be the law.

3. *Illegality.* What respondents fail to take into account is that the attempted action by the Federal Power Commission here complained of was attacked by petitioner in the District Court (R. 7-16) as wholly outside the ambit of the Commission's statutory power. It is an asserted *illegal* action of the administrative agency which petitioner sought to have the court enjoin, differing in this respect from the errors in the exercise of admitted jurisdiction which § 19(b) is designed to correct. At this point the

rule of the *Skinner & Eddy* case 249 US 557 (quoted in our petition pp. 7-8) is exactly in point. Respondents err in telling the Court (br. p. 14) that "*Skinner & Eddy* and the other cases cited did not involve original District Court injunction suits brought, outside of statutory provisions for court review, by persons against whom an administrative order . . . had been issued". That is just what *Skinner & Eddy* did involve, as shown by the statement of facts made by this Court in 249 US at 558 and 560. Further, all the other authorities cited in our petition on the point dealt with original District Court injunction suits, except for *United States ex rel. De Lucia* v. *O'Donovan* 178 F. 2d 876.

4. *Petitioner's Dilemma.* Pointing up the essential ambiguity of respondents' position, we call the Court's attention to the fact that it is argued (br. p. 13 at top) that

> "the Power Commission must decide initially whether petitioner is subject to the Act at all"

whereas it is also argued on the same page (br. p. 13 at bottom) that

> "this Court has already held that the Commission has jurisdiction over the independent producers generally".

Unless "the independent producers generally" include the petitioner, the latter statement makes no sense. If it is to be contended that the Commission's jurisdiction over this petitioner has already been pre-judged by this Court on the wholly different record in the *Phillips* case, 347 US 672, then indeed Order 174-A with its crushing economic impact upon petitioner's business relations with customers (peti-

tion pp. 5-6) will have been imposed on petitioner without judicial hearing or determination. The denial of due process is patent. This is the conclusion denounced by this Court's holding in the *Columbia Broadcasting* case, 316 US 407. The gross inequity resulting is what petitioner sought to be rescued from through the injunction below. The questions alleged to be "peculiarly within the Commission's competence" (br. p. 9) involve no *expertise* whatever, but are naked questions of law for the Court.

5. *Rule of Columbia Broadcasting.* Respondents' attempt to differentiate *Columbia Broadcasting System* v. *United States* 316 US 407 (br. pp. 12-3) fails. Our petition has pointed out (pp. 11-4) the close similarity between the two situations. The statement in the opinion below that C.B.S. attacked the broadcasting regulations in their entirety whereas this petitioner seeks only to have particular transactions classified as outside Order 174-A (230 F. 2d at 39), is not a tenable distinction, because even the court below concedes on the next page that petitioner directed its attack before the Commission "to the order as a whole" (230 F. 2d at 40). Thus the court below, while admitting the comparability of the situations, did not give petitioner the benefit of the same application of the general rule. Petitioner did indeed attack Order 174-A in its entirety, in so far as applying to the petitioner.

6. *State Jurisdiction.* The interference with State conservation regulations threatened by the 174 series of orders is handled by respondents with disappointing incompleteness (br. p. 15). The attempted rectification of the prior order, which was inserted in Order 174-B (App. 110) *after* the injunction had issued below, did not meet the difficulty at all. It was quite illusory. It provided that the Commis-

ion would recognize only "valid" conservation orders (see footnote 7, p. 18 of petition) of a State agency "relating to the production or gathering" of gas. By these phrases the Commission reserved the broadest latitude of exception and exclusion as regards the State regulatory jurisdictions to which petitioner is subject alike in Texas, in Louisiana, in Mississippi.

Conclusion

Respondents' opposition only underlines the conclusion that the action of the court below presents major questions in the interpretation of the Natural Gas Act and the application of administrative law which should receive immediate attention at the hands of this Court.

Respectfully submitted,

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